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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JUDITH M. PRITZLAFF,

Petitioner,

v.

ARCHDIOCESE OF MILWAUKEE, et al.,

Respondents.

On Petition for a Writ of Certiorari to the Wisconsin Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the First Amendment to the United States Constitution prohibit courts from imposing civil liability on religious organizations for acts arising out of secular activities?

2. Does the equal protection clause of the Fourteenth Amendment to the United States Constitution prohibit state courts from refusing to afford the same protections to one class of victims of sexual assault by parish priests as already afforded to the victims abused by their parents?

3. Does the due process clause of the Fourteenth Amendment to the United States Constitution allow claims to be dismissed despite the fact that a plaintiff is unaware of the harm suffered and the parties responsible for such harm?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Wisconsin Supreme Court are those in the caption as well as Reverend John T. Donovan and Arizona Health Care Costs Containment System and Health Care Financing Administration.

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PETITION FOR WRIT OF CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Wisconsin Supreme Court entered in this action June 27, 1995, and the final judgment of the Wisconsin Supreme Court entered on September 19, 1995.

OPINION BELOW

The decision of the Wisconsin Supreme Court is reported at 533 N.W.2d 780 (Wis. 1995).

BASIS FOR JURISDICTION

The final judgment of the Wisconsin Supreme Court was entered on September 19, 1995. This Court has jurisdiction to review the judgment of the Wisconsin Supreme Court pursuant to 28 U.S.C. § 1257(a). In addition, this court may properly hear the Wisconsin Supreme Court's state law ruling on the statute of limitations, as the decision on this issue has unreasonably obstructed Petitioner's federal rights. *N.A.A.C.P. v. State of Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

United States Constitution, Amendment XIV:

No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . .

STATEMENT OF THE CASE

Petitioner, Pritzlaff, initially met Defendant Father Donovan when she was a high school student in the late 1950s. Donovan was employed as a priest by Defendant Archdiocese of Milwaukee (hereinafter referred to as "Archdiocese") throughout the period that he was acquainted with Pritzlaff, including the time frame in which Donovan worked as a priest at Pritzlaff's high school. Between 1959 and 1965, Donovan used his position as a priest to develop a relationship with Pritzlaff. Donovan then used his position to force and coerce Pritzlaff into having a sexual relationship with him without her consent. As a result of the molestation, Petitioner suffered severe emotional distress. The emotional distress, combined with coping mechanisms, caused Pritzlaff to suppress her injuries and rendered her unable to perceive the existence, nature or cause of said injuries.

In November 1992 Petitioner, Pritzlaff, sued in Milwaukee County Circuit Court to recover damages for the injuries inflicted by Donovan during the course of his employment with the Archdiocese. On April 26, 1993, the circuit court granted the defendants' motion to dismiss. The trial court found that the statute of limitations barred the Petitioner's claims. The court also dismissed the negligence claim against the Archdiocese premised upon a finding that no viable claim existed under respondeat superior because the alleged abuse could not have occurred in the scope of Donovan's employment.

On August 23, 1994, the court of appeals reversed, holding that the claims were not barred by the statute of limitations. Further, the court held that the trial court erred in declining to recognize the tort of negligent supervision. The court of appeals also affirmed the dismissal of the cause of action under respondeat superior. The Archdiocese petitioned the Wisconsin Supreme Court for review, but was not joined by Father Donovan.

A divided panel of the supreme court dismissed all claims against the Archdiocese on June 27, 1995. The majority concluded that the statute of limitations barred Petitioner's claims. The court refused to apply the discovery rule to Petitioner's action, despite a previous Wisconsin Supreme Court ruling accepting application of the discovery rule in factually similar incest cases.[1] The majority also found that the First Amendment to the U.S. Constitution precluded a civil suit against the Archdiocese for negligent supervision, as such a claim would require a constitutionally impermissible examination of church hiring practices. The court relied, in part, on *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), and *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929), for its position that the U.S. Supreme Court would insulate religious organizations from civil liability for the tortious acts of employees. The court later rejected a motion to reconsider on September 19, 1995.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve questions regarding the interpretation of the judicial abstention doctrine, and the extent to which the doctrine insulates religious organizations from liability for their activities. The Wisconsin Supreme Court has construed the First Amendment as precluding civil suits filed against religious organizations. The decision below provides virtually unlimited immunity for religious organizations for their secular activities. The strict construction of the First Amendment adopted by the Wisconsin Supreme Court is not supported by the decisions of this Court. It seriously undermines the limitations on civil immunity that the U.S. Supreme Court has previously crafted.

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[1] *See infra*, note 10, for an explanation of the discovery rule.

Moreover, certiorari should be granted to clarify the extent to which states may treat similarly situated persons differently under the Fourteenth Amendment's mandate of equal protection. The Wisconsin Supreme Court has ruled that victims of sexual abuse by church clerics are not entitled to the same protections afforded to victims of abuse by a parent. This distinction arbitrarily and unreasonably provides for the disparate treatment of similarly situated individuals. In maintaining such artificial distinctions, the opinion below has contravened the previous language of this Court.

Finally, this Court should grant certiorari to resolve a question of due process. Specifically, the Wisconsin Supreme Court determined that Petitioner, as a sexual assault victim, knew all of the elements of her cause of action against the Archdiocese at the time Petitioner's relationship with Father Donovan ended. As a result, the court found that Petitioner's claims had lapsed under the statute of limitations. However, Petitioner had alleged in her complaint that she was unaware of the existence, cause and nature of her injuries. Petitioner also argued to the Wisconsin Supreme Court that she could not have had her cause of action against the Archdiocese accrue until she learned of the Archdiocese's role in causing her injuries. Petitioner therefore contends that the majority's dismissal fails to comport with the due process clause of the Fourteenth Amendment, since she was unaware of the existence, cause and nature of her injuries, as well as the Archdiocese's role in causing her harm.

I.

THE OPINION BELOW FAILED TO PROPERLY INTERPRET AND APPLY FEDERAL CONSTITUTIONAL LAW WITH REGARD TO THE FIRST AMENDMENT ISSUE.

A. The Wisconsin Supreme Court erred in finding that the First Amendment shields religious organizations from civil liability for the tortious acts of employees.

The *Pritzlaff* court's effort to unduly restrict the liability of a religious organization is based upon the doctrine of judicial abstention under the Free Exercise Clause of the First Amendment of the United States Constitution. U.S. Const. amend. I. The First Amendment embraces two concepts: freedom to believe and freedom to act. The first is absolute, but in the nature of things, the second cannot be. "Conduct remains subject to regulation for the protection of society." *Cantwell v. State of Connecticut*, 310 U.S. 296, 304 (1940). As this Court recently noted:

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition . . . We first had occasion to assert that principle in *Reynolds v. United States*, 98 U.S. 145 (1879), where we rejected the claim that criminal laws applied against polygamy could not be constitutionally applied to those whose religion commanded the practice. "Laws," we said "are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious beliefs superior to the law of the land, and in effect to permit every citizen to become a law unto himself." (citation omitted).

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 878-79 (1990).

The First Amendment analysis under the circumstances of this case must start with the basic and universal premise that religious organizations are liable for their torts. *Rayburn v. General Conference of Seventh Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986), *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993), *Erickson v. Christianson*, 781 P.2d 383 (Or. App. 1989). In order to raise a valid First Amendment defense, a party must set forth religious conduct which is in jeopardy. In essence, the party must show the existence of a sincerely-held religious belief with regard to the matter. *Abington School District v. Schempp*, 374 U.S. 203 (1963). The Archdiocese does not and cannot claim that sexual contact between a priest and parishioner is mandated, authorized or supported by church law. Indeed, the Archdiocese cannot convert its negligent and reckless acts into "religious conduct." Consequently, the Wisconsin Supreme Court erred in concluding that the First Amendment provides civil immunity to the Archdiocese for the tortious acts of employees.

B. The Wisconsin Supreme Court improperly expanded the doctrine of judicial abstention beyond the dictates of the U.S. Supreme Court.

The Wisconsin Supreme Court attempted to confer immunity to the Archdiocese under the limited doctrine of judicial abstention. The function of this doctrine was recently explained by this Court, stating that the government may not "lend its power to one or the other side in controversies over religious authority or dogma[.]" *Smith*, 494 U.S. at 87. While the U.S. Supreme Court has established that the free exercise clause of the First Amendment does limit judicial review of certain church hierarchy decisions involving purely internal disputes, this Court has never extended the doctrine of judicial abstention beyond internal

church disputes involving purely religious issues. Nor is such an extension of the doctrine warranted by the constitutional principles enunciated by this Court.

Pritzlaff concluded that the First Amendment of the United States Constitution:

> Prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices.

Pritzlaff v. Archdiocese of Milwaukee, 533 N.W.2d 780, 790 (Wis. 1995). The Wisconsin Supreme Court then held that claims of negligent hiring and retention are barred and "the torts of negligent training or supervision cannot be successfully asserted[.]" *Id.* at 791.

It is troubling that in reaching its First Amendment decision, the *Pritzlaff* court relied almost exclusively on a law review article.[2] Perhaps because of this reliance, the court

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[2] It is obvious that the supreme court's decision in *Pritzlaff* was colored largely by the vocation and status of the defendants in that case. One wonders why the supreme court gratuitously and irrelevantly notes that "the vast majority of priests and ministers of all religions lead responsible lifestyles above reproach." *Pritzlaff*, 533 N.W.2d at 786 n.3 (quoting James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 St. Thomas L. Rev. 31, 37 (1994)). While no one disputes the court's statement regarding other priests and ministers, it must also be pointed out that the best authorities estimate that approximately 6.5% of American priests engage in sexual misconduct with youth. A.W. Richard Sipe, Sex, Priests and Power, Anatomy of a Crisis 21 (Brunner/Mazel, Inc. 1995). Father Thomas Doyle, a canon lawyer and former canonist to the Papal Pro-Nuncio in Washington, D.C. estimates that approximately 3,000 American priests are inclined toward sexual molestation of minors. Jason Berry, Lead Us Not Into Temptation, Catholic Priests and the Sexual Abuse of Children XX (Prologue) (Doubleday 1992). Further, experts estimate

(continued...)

advanced the doctrine of judicial abstention far beyond the strict limits of that doctrine set by the U.S. Supreme Court. All of the cases cited in *Pritzlaff* by the Wisconsin Supreme Court involved internal religious disputes between factions of the church or personnel disputes between a church and its cleric/employee. These judicial abstention cases have been disputes involving purely ecclesiastical issues, where the parties have impliedly consented to be bound by church law on the issue, and where the church decisions and actions were not based upon religious doctrine or tenets that violate the laws of morality or property and which do not infringe upon personal rights. *Pritzlaff* improperly attempts to expand the limited doctrine of judicial abstention to cases involving secular harm to a third party. That expansion of the doctrine is not only unwarranted based

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[2] (...continued)

that at any given time since 1989, three dozen priests and brothers are incarcerated for sexual abuse and, for example, in September 1994, 60 priests were in prison for these offenses. Sipe at 26.

It is also jurisprudentially unfortunate that the court chose to cite absolutely unsupported and self-serving statements for the proposition that "a substantial percentage of allegations of clergy sexual abuse which do receive investigation prove later to be retracted or impossible to prove." *Pritzlaff*, 533 N.W.2d at 786 (citing O'Reilly & Strasser at 37). The law review article relied upon by the court for this statement cites as its authority, a statement written by one priest, glorifying the priesthood in a magazine article, and a statement by the church's primary insurer, given at a seminar presentation. Neither of these statements are supported by any evidence, and neither are given under oath. While one cannot know what is meant by "a substantial percentage," practitioners in the area would argue that in the vast majority of cases, either the offending priest admits to the abuse, the abuse is corroborated by church records establishing that the priest suffers this psycho-sexual malady, or other victims come forward to testify that they were molested by this priest in a substantially similar manner.

upon the constitutional principles enunciated by this Court, it is directly contrary to *General Counsel of Finance and Administration v. California Superior Court of San Diego*, 439 U.S. 1369 (1978) (J. Rehnquist) (The doctrine of judicial abstention does not apply "to purely secular disputes between third parties and a particular defendant, albeit a religiously affiliated organization.").

In reaching its decision, the *Pritzlaff* court relied upon selected quotes taken from "nearly a century of United States jurisprudence." *Pritzlaff*, 533 N.W.2d at 790. However, selected quotations from a century of Supreme Court cases, especially when taken out of context, may be employed to support virtually any purported constitutional claim. The *Pritzlaff* decision illustrates the danger inherent in the practice of removing a quote from its context. Only through such a practice can one arrive at the notion that the First Amendment of the United States Constitution grants all churches immunity from liability for the secular harm resulting from their reckless indifference to its clergy sexually abusing parishioners.

In order to properly understand the constitutional limitations placed upon courts, the history of the judicial abstention doctrine must be examined. This doctrine was first espoused by this Court in *Watson v. Jones*, 13 Wall. 679 (1871).[3] That case involved a dispute between the general assembly of the presbyterian church and the local church over possession of church property. This Court re-

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[3] *Watson* was decided before the First Amendment was made applicable to actions by the state under the Fourteenth Amendment. Therefore, it was not decided based upon the First Amendment. *Presbyterian Church v. Hull Church*, 393 U.S. 440, 445 n.4 (1969). Indeed, the pronouncements of the *Watson* court were not constitutionally based, and applied with equal vigor to all private voluntary associations. *Watson*, 13 Wall. at 714.

fused to interfere with the decision of the hierarchical church under the following reasoning:

> All who unite themselves to [a religious organization] do so with an *implied consent* to [the church's] government and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of religious bodies if anyone aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is the essence of these religious unions, and of their right to establish tribunals for the decision of *questions arising among themselves* that those decisions should be binding in all cases of ecclesiastical cognizance.

Id. at 728-29 (emphasis added). Thus, under *Watson*, civil courts may not interfere with the decisions of the church regarding *purely ecclesiastical disputes* among parties who have *impliedly consented* to the jurisdiction of the hierarchical church.

The U.S. Supreme Court later reaffirmed the doctrine of limited judicial abstention in *Gonzales v. Roman Catholic Archbishop of Manilla*, 280 U.S. 1 (1929). In *Gonzales*, this Court was asked to overturn the Bishop of Manila's decision to not ordain a boy as chaplain pursuant to the terms of a trust. Because the terms of the trust were expressly governed by and were to be interpreted by ecclesiastical, not civil law, the U.S. Supreme Court refused to accept jurisdiction over this issue. Relying on *Watson*, the Court held that "[i]n the absence of fraud, collusion, or arbitrariness, the decision of the proper church tribunal *on matters purely ecclesiastical*, although effecting civil rights, are accepted in litigation before the secular courts as conclusive, *because the parties in interest made them so by contract or otherwise*." *Id.* at 16 (emphasis added). Similar to *Watson*, the U.S. Supreme Court in *Gonzales* limited judicial abstention to cases involving:

(1) Internal disputes involving parties who have impliedly or otherwise consented to the jurisdiction and ultimate authority of the hierarchical church; and

(2) Decisions of the church tribunal on purely ecclesiastical issues.

Id.

Later, in *Kedroff v. St. Nichols Cathedral*, 344 U.S. 94 (1952), the U.S. Supreme Court faced a dispute between the Soviet and North American branches of the Russian Orthodox Church regarding legal title and possession of the New York Cathedral. This Court relied upon *Watson* and *Gonzales* to hold that since the authority to determine this issue was firmly vested in the church hierarchy, under church law, the state could not intercede under the First Amendment. *Id.* at 116. However, *Kedroff* again indicated that this doctrine of judicial abstention was limited to:

(1) Determinations of "purely ecclesiastical issues." *Id.* at 115;

(2) Where the parties have impliedly consented to be bound by church law on the issues. *Id.* at 114-15;

(3) Where the hierarchical church did not engage in improper methods of determining the issues (i.e., the decision was not arbitrary or based upon fraud or collusion) *Id.* at 116; and

(4) The decision was not based upon religious doctrine or tenets that "violate the laws of morality or property, and which do[] not infringe upon personal rights[.]" *Id.* at 114. ("Legislative power to punish subversive action cannot be doubted. If such action should be actually attempted by a cleric, neither his robe nor his pulpit would be a defense.") *Id.* at 109.

Thus, under *Kedroff*, the doctrine of judicial abstention remained limited to intra-organizational disputes involving purely ecclesiastical issues. The doctrine specifically did not apply to actions by the church that are violative of individual rights based upon the civil law.

This Court again considered the civil court's jurisdiction to decide religious disputes in *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1968). *Presbyterian* involved a dispute between two local churches and the national Presbyterian church. The local churches seceded from the national church. The national church then attempted to take over the local church's property. Rather than appealing the decision to church tribunals, the local church sued in civil court in Georgia under a Georgia statute that provided that if the national church substantially departed from its tenets of faith and practice, the property would remain in the possession of the seceding local churches. Following a jury verdict in favor of the local churches, the national church appealed, claiming that consideration of this issue was violative of the First Amendment. This Court noted that special problems arise when disputes implicate controversies over church doctrine and practices. *Id.* at 445. Relying on the principles set forth in *Watson*, *Gonzales* and *Kedroff*, the Court concluded that the Georgia statute was constitutionally infirmed because it would require the civil court to interpret a particular church's doctrine and the importance of that doctrine to the religion. *Id.* at 450. Once again, the U.S. Supreme Court applied the doctrine of judicial abstention to an intra-church dispute between factions of a particular church, involving "purely ecclesiastical concern[s]," (*Id.* at 449), where the civil court would be required to interpret and resolve matters of church doctrine. But the U.S. Supreme Court reaffirmed that absent these factors, judicial abstention is not appropriate. *Presbyterian* reaffirmed that civil courts are a proper tribunal for resolving internal church property disputes. *Id.* at 445. This is particularly appropriate when the dispute may be resolved by "neutral

principles" of civil law. *Id.* at 449.[4]

The limited nature of the judicial abstention doctrine was again emphasized by this Court in *Maryland and Virginia Eldership v. Sharpsburg, Inc.*, 396 U.S. 367 (1970). *Sharpsburg* involved a dispute between the regional church and local churches in which the U.S. Supreme Court was asked to determine which of two factions should control local churches and their property and corporations. The regional church appealed the Maryland Court's decision in favor of the local churches, claiming that this decision was violative of the First Amendment. In essence, the regional church attempted to invoke the judicial abstention doctrine. This Court refused to apply the doctrine because resolution of this dispute was based upon "the language in the deeds conveying the properties in question to the local church corporations, upon the terms of the charters of the corporations, and upon provisions in the constitution of the General Eldership pertinent to the ownership and control of church property." *Id.* at 367 (citation omitted). Consequently, since the Maryland court's resolution of the dispute "involved no inquiry into religious doctrine," the judicial abstention doctrine did not apply. *Id.* at 368.

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[4] *See also Jones v. Wolf*, 443 U.S. 604 (1979), in which this Court stated:

> The neutral principles approach cannot be said to "inhibit" the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, *hire employees*, or purchase goods. . .
>
> We cannot agree, however that the First Amendment requires the states to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved.

Id. at 605-06 (emphasis added).

The doctrine of limited judicial abstention was recently applied by this Court in *Serbian Eastern Orthodox v. Milivojevich*, 426 U.S. 713 (1976). That case again involved an internal dispute, this time between the international "mother" church and the American-Canadian Diocese of the Serbian Orthodox Church, concerning whether the mother church had the power to defrock the local bishop. Consistent with *Kedroff*, the Illinois Supreme Court determined that while this was a matter of ecclesiastical government and polity, the mother church's decision could be overturned because it was "arbitrary." The *Serbian* Court, based upon *Watson*, *Gonzales* and *Kedroff*, applied the judicial abstention doctrine. *Serbian* further indicated that civil courts could not inquire into whether the hierarchical church's decision was "arbitrary", contrary to the *Kedroff* decision, since that inquiry would itself involve interpretation of church law in violation of the First Amendment. The *Serbian* Court thus affirmed that:

> The fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues and dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes.
>
> . . .
>
> In short, the First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for *internal discipline and government*, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide *disputes over the government and direction of subordinate bodies*, the Constitution requires that civil courts accept their decisions as binding upon them.

Id. at 708, 724-25 (emphasis added).

Review of the historic development of the judicial abstention doctrine, and the principles elucidated by this Court in developing that doctrine, indicates that church bodies are free to establish and apply their own rules for church governance and resolution of internal disputes, and the church's decision on those issues are binding on members of that organization. Civil courts may still properly resolve even these disputes, but may not do so by "resolution by civil courts of controversies on a religious doctrine or practice." *Presbyterian*, 393 U.S. at 449. Judicial abstention has never been extended to situations, such as this case, that:

(1) Do not involve a dispute between internal factions of the church, requiring the court to side with one branch of the church over another;

(2) Do not involve disputes between parties who have impliedly consented to be bound by the law of the church on the issue;

(3) Do not require the court to resolve controversies over what is or is not the church's religious doctrine; *or*

(4) Involve church action which results in secular harm to a third party.

The Wisconsin Supreme Court suggests in *Pritzlaff* that the doctrine of judicial abstention should be extended to cases involving a dispute between the church and a third party who has not consented to the authority of the church hierarchy to resolve her dispute. However, Petitioner here has never submitted to the authority of the Archdiocese or canon law in general in resolving this issue, nor does she make any demand under church law. Rather, Petitioner is an independent third party seeking to impose civil liability upon the Archdiocese under the common law for the secular harm resulting from its negligent and reckless conduct. Petitioner has not asked that a court resolve any disputes over church law between competing factions of the church. This Court is simply asked to apply civil law to this reli-

gious corporation, like any corporation, to hold it civilly liable for the secular harm caused by its conduct.

The fundamental constitutional principles invoked in applying the doctrine of judicial abstention simply do not apply in this case. Moreover, extension of the doctrine to this type of a case was expressly rejected in *General Council of Finance and Administration v. Superior Court of California*, 438 U.S. 1369 (1978). In that decision, Justice Rehnquist reviewed the Methodist Church's application for a stay of proceedings pending certiorari in a tort claim brought by retirement home residents. Citing the intra-church line of cases involving purely ecclesiastical decisions, (the very line of cases relied upon by *Pritzlaff*) the Methodist Church claimed that the California Supreme Court had impermissibly determined personal jurisdiction over the church by "independently examining, and making the ultimate decision regarding the structures and actual operations of the hierarchical church and its constituent units in violation of the First and Fourteenth Amendments." Justice Rehnquist rejected this "judicial abstention" argument by distinguishing the internal dispute cases as follows:

> There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating *intra-church disputes*. . . . But this Court has never suggested that those constraints similarly apply outside the context of such intra-organizational disputes. Thus, *Serbian Eastern Orthodox Diocese* and the other cases cited by the Appellant are not on point. Those cases are premised on the perceived danger that in resolving intra-church disputes, the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. (citation omitted). Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, *albeit a religious affili-*

> *ated organization*, in which fraud, breach of contract, and statutory violations are alleged.

Id. at 1372-73. (emphasis added). Like *General Assembly*, this case does not involve an intra-organizational dispute. Like *General Assembly*, this case does not require the Court to "become entangled in essentially religious controversies." Like *General Assembly*, this case does not require the Court to "intervene on behalf of groups espousing particular doctrinal beliefs." Like *General Assembly*, this case simply requires the Court to apply neutral principles of civil law to purely secular disputes between a third party and a religious affiliated defendant. The judicial abstention doctrine simply does not apply in this case.[5]

C. Imposing civil liability on religious organizations for negligent retention and supervision of clergy does not violate the establishment clause.

To the extent *Pritzlaff* may be based upon the establishment clause of the First Amendment, that constitutional claim is also infirmed.

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[5] *See Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993) (parishioner's claim against the Episcopal Diocese for negligent hiring and supervision resulting in priest's sexual relationship with parishioner was not barred by the First Amendment since the claims did not involve disputes within the church, because the court did not interpret or weigh church doctrine and because neutral principles of law can be applied); *Molko v. Holy Spirit Association*, 762 P.2d 46 (Cal. 1988) (church may be held liable for deceptive recruitment practices because the marginal burden on the church's free exercise of religion is justified by the compelling state interest in protecting individuals and families); *Byrd v. Faber*, 565 N.E.2d 584 (Ohio 1991); *Neiman v. Cooley*, 637 N.E.2d 943 (Ohio Ct. App. 1994); *Mrozka v. Archdiocese of St. Paul and Minneapolis*, 482 N.W.2d 806 (Minn. Ct. App. 1992); *Hutchinson v. Luddy*, 606 A.2d 905 (Pa. Super. 1992); *Erickson v. Christianson*, 781 P.2d 383 (Or. App. 1989).

State action does not violate the establishment clause if such action:

(1) Has a secular purpose;

(2) Has a primary effect which neither advances nor inhibits religion; and

(3) Does not foster excessive entanglement with religion.

Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The first two prongs of this test are not even arguably implicated in this case. At issue here is universal application of common law negligence. This application has a secular purpose, and its primary effect neither advances nor inhibits religious conduct. Rather, *Pritzlaff* merely involves application of the civil common law to church employers in conformity with neutral principles of law previously sanctioned by this Court. *See Jones*, 443 U.S. at 605-06; *see also Molko*, 762 P.2d at 61.

Nor does this case involve "excessive entanglement" with religion. The *Lemon* Court was concerned that state action may result in administrative and political entanglement. Administrative entanglement typically involves comprehensive, discriminating and continual state surveillance of religion. *Lemon*, 403 U.S. at 619-22. Of particular concern is the danger that government action may "have self-perpetuating and self-expanding propensities." *Id.* at 624. This generally occurs when the state grants regulated aid to groups affiliated with religious institutions, thus requiring ongoing monitoring. *See, e.g., Vernon v. City of Los Angeles*, 27 F.3d 1385, 1400-01 (9th Cir. 1994). *Pritzlaff*, however, involves a single inquiry under the neutral principles of law into whether the church negligently employed a single priest. There is not the threat or necessity of the government's ongoing monitoring of the church's employment decisions. Thus, no excessive entanglement is at issue. *Id. See also NLRB v. Hanna Boys Center*, 940 F.2d 1295, 1304 (9th Cir.

1991) (finding no entanglement where the national labor relation's board jurisdiction over a church-owned school required government involvement only with respect to specific claims filed on behalf of specific employees); *United States v. Freedom Church*, 613 F.2d 316 (1st Cir. 1979).

The second potential political entanglement recognized by *Lemon* involved the potential for political divisiveness resulting from government action which divides citizens along political lines. The threat of political divisiveness has never alone been grounds for a court to find a violation of the establishment clause. *Vernon*, 27 F.3d at 1401. Moreover, there is simply no evidence that political divisiveness would occur in this case, since this Court is merely asked to treat the church like any other employer. Therefore, application of the three pronged test established in *Lemon* reveals that this case does not involve a violation of the establishment clause of the First Amendment.

D. The basis and rationale for the *Pritzlaff* court's decision is infirmed.

The decision in *Pritzlaff* was based upon the proposition that Petitioner's negligence claims would improperly require that a court determine "what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices." *Pritzlaff*, 533 N.W.2d at 790.

In this case, however, no such inquiry is required. This Court is not asked to "determine what makes one competent to serve as a Catholic priest." Nor is this Court asked to interpret church canons, church policies or church practices. The Archdiocese's rights under church canons, policies and practices to place Father Donovan wherever it wants to are not in dispute. It is free to conduct the internal government of the church in any manner it so chooses. And the

church decisions are binding on all within the church who make claims under church law.[6] However, the church's authority to govern the church as it sees it is one thing; immunity for secular harm to third parties based upon these decisions is quite another. Like any other corporation, if the church's negligent conduct results in secular harm, it is liable for that secular harm under application of neutral principles of secular law. A fundamental principle of the First Amendment is that churches remain liable for their secular torts and even arguably religious conduct remains subject to regulation by the civil courts for the protection of society. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

The Wisconsin Supreme Court's rationale for application of this rule is similarly infirmed. Citing a law review article, the *Pritzlaff* court determined that church employers cannot be found negligent because "negligence requires the court to create a 'reasonable bishop' norm." *Pritzlaff*, 533 N.W.2d at 790 (citing O'Reilly & Strasser at 47). That claim is simply untenable. When a bishop's placement decision results in secular harm to a third party, the bishop, like any other employer, is subject to the civil law. The standard for negligent retention and supervision claims is a civil law standard that does not require the court to interpret or apply religious law or dogma. This case involves inquiry into whether the bishop acted as a "ordinary prudent person" in making this decision, not whether he acted as a "reasonable bishop." *Peters v. Holiday Inn, Inc.*, 278 N.W.2d

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[6] Arguably, for example, if Father Donovan disputed his placement by the Archdiocese at a particular establishment, he could not bring that dispute to a civil court. That issue directly involves the church's authority to decide matters of internal governance free of civil court interference. Because Father Donovan's claim of entitlement would rest on canon law and because he has impliedly consented to the church's authority on the issue, the civil court may not interfere.

208 (Wis. 1979). His conduct, like any other employer's conduct, is to be measured based upon the "reasonable person" standard. As with any corporation, compliance with industry standards does not create immunity in tort.[7] Thus, whether a defendant acted in conformity with the standard set by other bishops is not determinative, and this Court need not establish a "reasonable bishop" standard. The bishop is free to let "beliefs in penance, admonition and reconciliation as a sacramental response to sin" influence or control employment decisions within the internal governance of the church. *Pritzlaff*, 533 N.W.2d at 790 (citing O'Reilly & Strasser at 47). However, if this decision does not meet the standard of a "reasonable person," the bishop employer, like any other employer, remains liable for the resulting secular harm.

Further, the law review article relied upon in *Pritzlaff* questions:

> If negligent selection of a potential pedophile for the religious office of priest, minister, or rabbi is a tort as to future child victims, will civil courts also hear Title VII challenges by the non-selected seminarian against the theological seminary that declines to ordain a plaintiff into ministry because of his psychological profile? How far shall the court's qualitative entanglement with religious selectivity extend?

Id. (citing O'Reilly & Strasser at 47). The answer to this question is quite well established under the constitutional principles elucidated by the U.S. Supreme Court. The seminarian in the cited example:

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[7] "One of the best known principles of law . . . is that compliance with [industry] custom is no defense to a tort claim." *Rodi Yachts, Inc. v. National Marine, Inc.*, 984 F.2d 880 (7th Cir. 1993).

(a) Seeks appointment based upon church law;

(b) Has impliedly consented to the authority of the church in making this ecclesiastical appointment;

(c) The employment is based upon the dispute over qualifications based truly upon religious doctrine; and

(d) The church decision does not result in secular harm to a third party.

Thus, the doctrine of judicial abstention will likely apply to the seminarian's case, since it is a matter of internal church governance. *See Gonzales v. Roman Catholic Archbishop of Manilla*, 280 U.S. 1 (1929). None of these factors apply here.

The Wisconsin Supreme Court finally relies upon selected quotations from the U.S. Supreme Court to support the proposition that "Freedom to select the clergy . . . must now be said to have federal constitutional protection as part of the free exercise of religion against state interference." *Pritzlaff*, 533 N.W.2d at 790 (quoting *Kedroff*, 344 U.S. at 116). The *Pritzlaff* court's analysis illustrates the danger inherent in removing a select quotation from its context.[8] As

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[8] The quote in *Pritzlaff*, put in its proper context, is as follows:

> The [*Watson*] opinion radiates, however, a spirit of freedom for religious organizations, and independence from secular control or manipulation - in short, power to decide for themselves, free from state interference, *matters of church government as well as those of faith and doctrine*. Freedom to select the clergy, *where no improper methods of choice are proven*, we think, must now be said to have federal constitutional protection as part of the free exercise of religion against state interference.

Kedroff, 344 U.S. at 116. (emphasis added).

The thrust of the quoted language is that the judicial abstention doctrine, previously set forth in *Watson*, was for the first time in *Kedroff* to be based on the First Amendment constitutional protections. Moreover, and conspicuously absent from the cita-

(continued...)

set forth herein, the cases relied upon by *Pritzlaff*, (i.e., *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), *Gonzales v. Roman Catholic Archbishop of Manilla*, 280 U.S. 1 (1929), *Rayburn v. General Conference of Seventh Day Adventists*, 722 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986), *Olston v. Hallock*, 201 N.W.2d 35 (Wis. 1972), *Black v. St. Bernadette's Congregation*, 369 N.W.2d 550 (Wis. Ct. App. 1984)), all involve internal disputes with claims made under and governed by church law. Each of these cases involve a claim by a cleric to entitlement of a position within the church government, the resolution of which would require a court to inquire into religious disputes and impose upon the internal church body the state's preference as to whom is qualified to serve as a cleric. These factors fall squarely within the limited judicial abstention doctrine applied by the U.S. Supreme Court. However, none of those factors apply in this case, which involves a claim by a secular third party that is governed by the civil law. Petitioner here does not make any claim under church law. Petitioner here does not claim that she is competent and entitled to serve in a position within the internal church government. The cases are utterly distinguishable. While the church is free to determine who is competent and qualified to be a priest, and that decision is binding upon the party seeking such appointment under church law governance, if the church's appointment results in secular harm to a third party, the church is liable.

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[8] (...continued)

tion in *Pritzlaff*, the *Kedroff* court limited the church's freedom to select clergy free from state interference to those cases "where no improper methods of choice are proven." Finally, the quotation from *Kedroff* in its proper context, is in full conformity with the Court's decisions in *Watson*, *Gonzales* and the other cases cited herein and does not create a universal expansion of judicial abstention in all cases involving the church's choice of clergy.

E. The *Pritzlaff* decision contravenes federal constitutional law by failing to provide a logical stopping point to a church's civil and criminal immunity for the secular harm inflicted on a third party.

Courts have long held that religious organizations are not immune from civil and criminal liability. *Cantwell v. Connecticut*, 310 U.S. 296 (1940), *Erickson v. Christianson*, 791 P.2d 383 (Or. App. 1989), *Mrozka v. Archdiocese of St. Paul and Minneapolis*, 482 N.W.2d 806 (Minn. Ct. App. 1992), *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986), *Moses v. Diocese of Colorado*, 863 P.2d 310 (Colo. 1993). Yet there is no logical end to the civil (and presumably criminal) amnesty granted by the ill-conceived *Pritzlaff* decision. For example, if a bishop tells an obviously intoxicated priest to deliver documents to a parish, places the priest in the car, starts the car, shifts the car to drive and shortly thereafter the car hits and kills a child on the sidewalk, under *Pritzlaff* would the bishop be immune from civil court interference with this religious employment decision? Would a religious superior, who as a purported fundamental tenet of his religion, ordered a priest to sacrifice a human being be immune from criminal or civil liability? Would a bishop, who, after contracting with an electrician or plumber to perform repairs on the chancery, decides that payment for the bill is not authorized under church law be immune from a breach of contract claim? Could anyone under the guise of religion engage in virtually any acts with civil and criminal impunity simply by clothing those acts under the garb of "religion?" These very types of issues have been considered and the First Amendment immunity claims have been rejected by the U.S. Supreme Court in uniformally concluding that the free exercise clause was never intended to prohibit state action for the punishment of acts inimical to the peace, good order and morals of soci-

ety.[9] Obviously, if the civil court is without jurisdiction, the state cannot carry out its public duty. That is precisely why the limitations of the judicial abstention rule are necessary.

II.

THE OPINION BELOW DENIED PETITIONER EQUAL PROTECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT.

Under the U.S. Constitution, the Fourteenth Amendment protects the citizenry from state action which results in a deprivation of equal protection. U.S. Const. amend. XIV. According to this Court, the equal protection clause means that the rights of all persons must rest upon the same rule in similar circumstances. *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32 (1928). No greater burdens are to be laid upon one individual than are laid upon others in the same condition. *Bell's G.R. Co. v. Pennsylvania*, 134 U.S. 232 (1890). Application of the Fourteenth Amendment to afford proper constitutional protections will therefore turn on the peculiar circumstances of each case. *Safeway Stores, Inc. v. Oklahoma Retail Grocers Asso.*, 360 U.S. 334 (1959).

Moreover, the Fourteenth Amendment prohibits the state from engaging in arbitrary discrimination; that is, discrimination without reasonable basis. *Denver v. New York Trust Co.*, 229 U.S. 123 (1913). The prohibition on arbitrariness requires that the state's classification rest on real and not feigned differences, such that different treatments will not be so disparate, relative to the difference in classification, as to constitute arbitrary state action. *Walters v. St. Louis*, 347 U.S. 231 (1954). Consequently, the equal protection

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[9] *Davis v. Beacon*, 133 U.S. 333 (1890), *Cantwell v. Connecticut*, 310 U.S. 296 (1940), *United States v. Lee*, 455 U.S. 252 (1982), *Bob Jones University v. United States*, 461 U.S. 574 (1983).

clause dictates that courts apply justice equally to all parties. *Schilb v. Kuebel*, 404 U.S. 357 (1971).

Pursuant to these constitutional mandates, the Wisconsin Supreme Court violated Petitioner's right to equal protection of the law when it set forth an arbitrary classification designed to extinguish Petitioner's claim under Wisconsin's statute of limitations.[10] Specifically, the supreme court found that Wisconsin's discovery rule did not apply to Petitioner's claims, despite the fact that the discovery rule has previously been accepted in the context of incest cases. The "incest exception" allows a victimized plaintiff:

> to avoid a motion to dismiss on the pleadings where she alleges that she was unable to forge a connection between the abuse and her latent emotional injuries despite the exercise of reasonable diligence, even though the plaintiff does not allege that she repressed all memories of the abuse.

Pritzlaff, 533 N.W.2d at 787.

In explaining the rationale underlying the "incest exception", the supreme court explained:

> The rule focuses on the unique harms and relationships between the tortfeasor and victims which exist in cases of incest. For example, what is unfortunately a fairly typical fact scenario in incest cases was described in *Hammer*. There, the conduct occurred in secret and was

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[10] The supreme court noted that the applicable statute of limitations against the Archdiocese was three years. *Pritzlaff*, 533 N.W.2d at 784 (citing sec. 893.54, STATS.). However, Petitioner argued that Wisconsin's judicially crafted discovery rule, *Hansen v. A.H. Robins, Inc.*, 335 N.W.2d 578 (Wis. 1983), served to extend the time in which a claim could be brought. Under the discovery rule, the cause of action accrues on the date the injury was discovered or with reasonable diligence should be discovered, though not on the date of the act that resulted in the injury. *Pritzlaff*, 533 N.W.2d at 784 (citing *Hansen*, 335 N.W.2d at 583).

> accompanied by threats that harm would come to the victim if she ever told anyone about it and the victim was repeatedly told that she had caused the acts and that they were her fault. (citations omitted). Further, because of these relationships and types of factual situations, and because of the age of the victims, oftentimes victims do not realize the wrongfulness of the acts. (citation omitted). Thus, for reasons of public policy, a special discovery rule has been created for these cases in an effort to provide adequate protection to children who "have been harmed because of a 'most egregious violation of the parent/child relationship.' " (citations omitted).

Pritzlaff, 533 N.W.2d at 788.

However, in delineating the special circumstances which warrant the "incest exception," the Wisconsin Supreme Court refused to recognize that equally "unique" circumstances govern the relationship between Petitioner and Father Donovan. Arguably, the sexual assault of a plaintiff in the priest/parishioner relationship is just as egregious as parent/child incest. In both situations, tortfeasors have taken advantage of the vulnerabilities of plaintiffs to carry out acts of molestation. In both situations, plaintiffs may have difficulty recognizing the wrongfulness of the assaults because of the trust developed in the status relationship between tortfeasor and victim. The substantial similarity between the two scenarios requires that the state treat these victims equally under the law.[11] There is no rational basis from which to find that victims of incest are any more entitled to protection by the state than victims of sexual assault by parish priests. The current artificial distinctions recognized by the Wisconsin Supreme Court can amount to

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[11] Indeed, the supreme court's findings are even more difficult to understand when one considers the plight of minors who are abused by priests.

nothing more than an arbitrary classification. Consequently, this Court should find that the lower court erred in concluding that Pritzlaff was not entitled to the same protection under the discovery rule as victims of incest, and therefore denied Pritzlaff equal protection of the law under the Fourteenth Amendment.

III.

THE OPINION BELOW DENIED PETITIONER DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

Under the Fourteenth Amendment to the U.S. Constitution, guarantees of due process are designed to protect the individual against the arbitrary action of government. *Wolff v. McDonnell*, 418 U.S. 539 (1974). Such constitutional protection demands that the government not create laws that are unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained. *Nebbia v. New York*, 291 U.S. 502 (1934). This federal guaranty of due process extends to state action through its judicial branch of government. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930).

In addition, determining what constitutes due process depends on circumstances that vary with the subject matter and the necessities of the situation. *Moyer v. Peabody*, 212 U.S. 78 (1909). A balancing of relevant and conflicting factors is a necessary process. *Bartkus v. Illinois*, 359 U.S. 121 (1959).

Consistent with these principles, the Wisconsin Supreme Court erred when it concluded that the statute of limitations barred Pritzlaff's causes of action. According to the majority's reasoning, Pritzlaff's claim against the Archdiocese could not stand because she knew all of the elements of her underlying claim against Father Donovan by the

time the relationship between the two ended. *Pritzlaff*, 533 N.W.2d at 785.

However, a fundamental tenet of due process prohibits the government from requiring a person to swear to a fact that the individual cannot be expected to know. *Louisiana ex rel. Gremillion v. N.A.A.C.P.*, 366 U.S. 293 (1961). In *Pritzlaff*, the Wisconsin Supreme Court expected Pritzlaff to understand both the existence and nature of her injuries as well as the role the Archdiocese played in causing such injuries. Such reasoning is infirmed.

At the pleading stage under Wisconsin law, the supreme court was required to liberally construe the pleadings and accept the allegations as true. *Pritzlaff*, 533 N.W.2d at 784 (citing *Bowen v. Lumbermens Mut. Cas. Co.*, 517 N.W.2d 432 (Wis. 1994)). Pritzlaff alleged to the court that:

> As a result of the psychological distress caused by the sexual advances and the coping mechanisms which were subsequently developed . . . she has suppressed and been unable to perceive the existence, nature or cause of her psychological and emotional injuries until April, 1992.

Id. at 783. Despite Pritzlaff's allegations, the majority improperly charged her with knowledge of her psychological and emotional injuries. Such action cannot stand under due process principles.

Moreover, Pritzlaff could not properly be charged with knowledge of the Archdiocese's role in causing her injuries. In many sexual abuse cases, including the current action, Pritzlaff could not have known what the Archdiocese did, or did not do, to allow, encourage or support the assault upon her, as she has alleged, until much later, and perhaps not until the commencement of her lawsuit or thereafter during the course of discovery. Consequently, the Wisconsin Supreme Court arbitrarily expected Pritzlaff to have an

awareness of facts beyond that which is required by pleading rules in Wisconsin, and most importantly, beyond that which is required by the due process clause. The particular circumstances of this case require that the Court find that Wisconsin acted unreasonably and in violation of the Fourteenth Amendment when it extinguished Pritzlaff's causes of action under the statute of limitations.

CONCLUSION

For the foregoing reasons, the Petitioner urges this Court to issue a writ of certiorari to the Wisconsin Supreme Court to review its judgment and opinion.

Respectfully submitted,

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APPENDIX

[Filed June 27, 1995]

No. 93-1846

STATE OF WISCONSIN : IN SUPREME COURT

JUDITH M. PRITZLAFF,

Plaintiff-Appellant,

v.

ARCHDIOCESE OF MILWAUKEE,

Defendant-Respondent-Petitioner,

REVEREND JOHN T. DONOVAN,

Defendant-Respondent,

ARIZONA HEALTH CARE COSTS CONTAINMENT SYSTEM AND HEALTH CARE FINANCING ADMINISTRATION,

Defendants.

Review of a decision of the court of appeals. **Reversed.**

Day, J. This is a review of a decision of the court of appeals reversing an order of the circuit court for Milwaukee County, Honorable John G. Bartholomew, presiding, that dismissed all claims against the Archdiocese of Milwaukee (Archdiocese) and the Reverend Father John Donovan (Fr. Donovan) arising out of a relationship that was alleged to have occurred between Fr. Donovan and Ms. Judith M. Pritzlaff from 1959 to 1965 for failure to state a claim upon which relief can be granted and because the claims were barred by the statute of limitations. Sec. 802.06, Stats. (1993-94). We conclude that to allow the claim to proceed against the Archdiocese based on Ms. Pritzlaff's allegation concerning Fr. Donovan despite the

passage of twenty-seven years since the end of the alleged relationship would be contrary to the public policy of the State. We also conclude that the claims of negligent hiring, retaining, training and supervision are barred by the First Amendment in this case. We therefore reverse that portion of the decision of the court of appeals which remanded the case for a trial of the negligent hiring, training and supervision claim against the Archdiocese.

Ms. Pritzlaff first filed a complaint against Fr. Donovan and the Archdiocese on November 12, 1992. The relevant allegations from her complaint are as follows:

> 4. That at all times material, defendant Donovan was a Roman Catholic priest and an agent/representative of the defendant Archdiocese.
>
> 5. That defendant Donovan first met the plaintiff while she was a high school student in the late 1950's.
>
> 6. That thereafter, while acting in his capacity as a priest, defendant Donovan used said position to develop a friend like relationship with the plaintiff.
>
> 7. That defendant Donovan continued said relationship with the plaintiff.
>
> 8. That defendant Donovan did in fact use said relationship and his position as a priest to coerce the plaintiff to have a sexual relationship with him.
>
> 9. That as a result of the actions of defendant Donovan, the plaintiff has suffered and continues to suffer from severe emotional distress, causing and contributing to the break-up of her marriage, separation from her children, loss of jobs and other difficulties.
>
> . . .
>
> 11. That at all times the defendant Archdiocese knew or should have known the type of conduct being pursued by Donovan and should have taken steps to stop same.

Five days later, on November 17, 1992, Fr. Donovan filed a motion to dismiss for failure to state a claim, asserting among other things that the claim was barred by the statute of limitations. On December 28, 1992, the Archdiocese also filed a motion to dismiss for failure to state a claim which asserted that the alleged conduct of Fr. Donovan was not tortious, that the action was barred by the statute of limitations, and that the Archdiocese was not responsible as a matter of law for the alleged conduct of Fr. Donovan.

In apparent response to the defendants' motions, on January 20, 1993, Ms. Pritzlaff filed an amended complaint. The amended complaint was divided into two causes of action. The first cause of action was against Fr. Donovan for his alleged actions. The second cause of action was against the Archdiocese and incorporated by reference all of the allegations against Fr. Donovan. The amended complaint reasserted most of the allegations made above and added the following relevant allegations:

> 9. That defendant DONOVAN did in fact use said relationship and his position as a priest to force and coerce the plaintiff to have a sexual relationship with him without her consent.
>
> 10. That Defendant DONOVAN caused Plaintiff JUDITH M. PRITZLAFF, to suffer and continues to suffer from severe emotional distress, causing and contributing to the break-up of her marriage, separation from her children and serious personal injuries, including but not limited to severe and painful psychological injuries, which injuries are permanent in nature and have caused her to incur pain, suffering, humiliation, disability, loss of earning capacity and a loss of an ability to enjoy life and expenses for medical and psychological treatment.
>
> 11. As a result of the psychological distress caused by the sexual advances and the coping mechanisms

> which were subsequently developed by JUDITH M. PRITZLAFF, she has suppressed and been unable to perceive the existence, nature or cause of her psychological and emotional injuries until approximately April, 1992.
>
> . . .
>
> 15. That upon information and belief, and at all times material hereto, the ARCHDIOCESE was responsible for the training and placement and supervision of archdiocesan priests and the assignment of those priests into archdiocesan's schools and church parishes within the Milwaukee Archdiocese.
>
> 16. The ARCHDIOCESE had a duty to admit only qualified candidates into the priesthood, properly test and screen candidates for the priesthood and priests to ascertain if such persons had an illness or sexual inclination which caused a priest to be sexually attracted to teenage girls/young women, . . . prior to placing a priest in to the community, to make appropriate placements of priest considering all relevant factors, supervise the priests which the archdiocese placed into the community, to counsel and guide priests in dealing with issues of celibacy and human sexuality and to supervise the operation of the various parishes located within the Archdiocese, including but not limited to all parishes at which DONOVAN served.
>
> . . .
>
> 20. The ARCHDIOCESE knew or should have known that DONOVAN had a sexual problem prior to 1959 and acted willfully, intentionally and in wanton and reckless disregard of the rights and safety of plaintiff by failing to remove DONOVAN from serving as a priest . . . .

On February 8, 1993 and February 26, 1993, Fr. Donovan and the Archdiocese again filed motions to dismiss for failure to state a claim. In addition to the reasons stated in their first motions to dismiss, the Archdiocese

asserted that the negligent supervision claim was inadequately pleaded and that First Amendment precluded a court from finding any liability on the part of the Archdiocese for negligent supervision. Ms. Pritzlaff did not respond to the defendants' motion to dismiss until March 31, 1993. The Archdiocese asserted that this failure to file a timely brief in opposition to the motion to dismiss was also a ground for dismissing the complaint.

On April 26, 1993, the circuit court granted the defendants' motions to dismiss. The court held that the Archdiocese was not responsible under the doctrine of respondeat superior since the alleged actions of Fr. Donovan could not have been in the scope of his employment, that there is no basis to hold the Archdiocese liable on a theory of negligence, and that the statute of limitations bars the claims both because the plaintiff failed to exercise due diligence in discovering her claim and because "to allow this action to proceed after a passage of 27 years would be fundamentally wrong and in clear violation of sound public policy." Ms. Pritzlaff appealed the circuit court order.

On August 23, 1994, the court of appeals held that the claims were not barred by the statute of limitations. It also held that the circuit court erred when it declined to recognize the claim of negligent supervision. However, the court of appeals affirmed the circuit court's conclusion that the Archdiocese was not liable on a theory of respondeat superior. The Archdiocese, but not Fr. Donovan, petitioned this court for review of the court of appeals' decision. We granted that petition for review.[1]

[1] Fr. Donovan did not petition this court for review in a timely manner. However, Ms. Pritzlaff's second cause of action incorporates by reference the allegations against Fr. Donovan and the claims against the Archdiocese are predicated on those allegations. Therefore, it is necessary for this court to discuss Ms. Pritzlaff's allegations against Fr. Donovan.

Ms. Pritzlaff did not file a cross-petition seeking review of the court of appeals decision that the Archdiocese could not be held liable on a theory of respondeat superior. That issue is therefore not before this court.

This case requires this court to review the pleadings to determine if they state a claim upon which relief can be granted. When undertaking such a review, this court liberally construes the pleadings, and accepts the allegations in the pleadings as true. *Bowen v. Lumbermens Mut. Cas. Co.*, 183 Wis. 2d 627, 635-36, 517 N.W.2d 432 (1994). Further, this court will dismiss claims for failure to state a claim upon which relief can be granted only if "it is quite clear that under no conditions can the plaintiff recover." *Id.* at 636.

A threshold question when reviewing a complaint is whether the complaint has been timely filed, because an otherwise sufficient claim will be dismissed if that claim is time barred. Sec. 802.06, Stats. (1993-94). Since we conclude that Ms. Pritzlaff's twenty-seven year old claim is time barred, we reverse that portion of the decision of the court of appeals which remanded the claim against the Archdiocese for negligent supervision.

The relevant statute of limitations for actions against the Archdiocese is three years. *See* sec. 330.205, Stats. (1963), and its successor, sec. 893.54, Stats. (1993-94). The three year period begins on the same date that the cause of action accrued against Fr. Donovan. Thus, unless the statute of limitations was tolled, Ms. Pritzlaff filed her claims well past the time allowed by statute. However, under some circumstances, public policy dictates that the date that a cause of action accrues be well after the date of the act that caused harm. Those circumstances are outlined in the judicially created "discovery rule." We as-

sume, without deciding, that the discovery rule applies to the Archdiocese.[2]

The first Wisconsin case to approve the discovery rule was *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983). In that case, the plaintiff was allegedly injured by a "Dalkon Shield" intrauterine device manufactured by the defendant and inserted into her uterus in 1974. *Id.* at 552. She began to suffer symptoms some time just prior to June 13, 1978, and sought medical care on June 16, 1978. *Id.* However, her doctor told her she was in good health and noted that she had no symptoms on that day. *Id.* The symptoms returned, and on June 26, 1978, the plaintiff went to another doctor. *Id.* at 553. That doctor removed the Dalkon Shield and correctly diagnosed her condition as pelvic inflammatory disease. *Id.* She filed suit on June 24, 1981. *Id.* This court, in rejecting the statute of limitations defense asserted by A.H. Robins, Inc.,

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[2] At least one court has declared that the statute of limitations will not be extended against an employer based on the discovery rule. That court stated:

> It is one thing to extend a statute of limitations to the individual primarily responsible for the plaintiff's injuries, and another to apply an open-ended period of limitations to the employer of the assailant. To allow lawsuits based on an employer's negligence in hiring, training and retaining an employee years after the abuse is alleged to have occurred, and, in many cases, years after the assailant's employment has ended, would, we believe, have serious economic repercussions which would stifle business growth.
>
> More importantly, it would deny such defendants a meaningful opportunity to defend against such accusations.

Debbie Reynolds Prof. Rehearsal Studios v. Superior Court, 25 Cal. App. 4th 222, 233 (1994). However, other courts have assumed that the discovery rule also applies to the employer. *Doe v. Coffee County Bd. of Educ.*, 852 S.W.2d 899, 908 (Tenn. App., 1992); *Callahan v. State*, 464 N.W.2d 268, 273 (Iowa, 1990).

held that the cause of action accrued on the date the injury was discovered or with reasonable diligence should be discovered, not on the date of the act that resulted in the injury. *Id.* at 560. Therefore, since the plaintiff discovered the injury on June 26, 1978 and commenced her action on June 24, 1981, the action was not barred by the three year statute of limitations. *Id.* at 561.

Three years later, this court expanded the scope of the discovery rule in *Borello v. U.S. Oil Co.*, 130 Wis. 2d 397, 388 N.W.2d 140 (1986). There, the defendant installed a furnace in the plaintiff's home in December 1977. *Id.* at 400. On December 29, 1977, the plaintiff complained to the defendant in a letter that her previous furnace problems were worse with the new furnace and also complained of an odor from the furnace, respiratory problems and headaches. *Id.* She consulted three physicians, all of whom told her that her complaints could not, with any degree of certainty, be attributed to the furnace. *Id.* at 401. She was hospitalized on February 5, 1979. *Id.* at 401-02. When she returned to her home on February 20, 1979, she found flat surfaces covered with a red dust. *Id.* at 402 She asserted that she then knew that the furnace was the cause of her illness. *Id.* However, on March 12, 1979, she consulted another doctor who said he did not believe that her symptoms were related to the furnace. *Id.* Finally, in October 1979, she consulted an occupational medicine specialist who concluded that her symptoms were a result of metal fume fever caused by the furnace. *Id.* at 402-03. She filed her complaint in November 1981. *Id.* at 403. "Accordingly, we are confronted by a situation where a complainant was injured more than three years before the filing of the complaint and almost contemporaneously with that injury formed her own layperson's subjective opinion that the furnace was the cause. Yet at every turn,

she was told by professionals, . . . that the furnace fume problem was irrelevant." *Id.* at 403-04. "A person who has used reasonable diligence to secure medical advice should be given the protection of one who is 'blamelessly ignorant.' " *Id.* at 414. This court held that "cause of action does not accrue until the nature of the injury *and* the cause—or at least a relationship between the event and the injury—is or ought to have been known to the claimant." *Id.* at 406-07.

Ms. Pritzlaff argues that her claim is saved by the discovery rule because "she has suppressed and been unable to perceive the existence, nature or cause of her psychological and emotional injuries until approximately April, 1992." Therefore, she argues that her suit, commenced November 12, 1992, is timely.

We conclude that Ms. Pritzlaff's claim does not qualify for the tolling of the statute of limitations provided by the discovery rule because Ms. Pritzlaff knew of all of the elements of her underlying claim against Fr. Donovan, at the latest, by the time the relationship between the two ended.

It is well settled that a cause of action accrues when there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a present right to enforce it. *Meracle v. Children's Serv. Socy.*, 149 Wis. 2d 19, 437 N.W.2d 532 (1989); *Barry v. Minahan*, 127 Wis. 570, 573, 107 N.W. 488 (1906). A party has a present right to enforce a claim when the plaintiff has suffered actual damage, defined as harm that has already occurred or is reasonably certain to occur in the future. *Hennekens v. Hoerl*, 160 Wis. 2d 144, 152, 465 N.W.2d 812 (1991). The discovery rule does not change these basic propositions, it simply defines some of the elements. That

is, the discovery rule is so named because it tolls the statute of limitations until the plaintiff discovers or with reasonable diligence should have discovered that he or she has suffered actual damage due to wrongs committed by a particular, identified person. Until that time, plaintiffs are not capable of enforcing their claims either because they do not know that they have been wronged, *see Hansen*, 113 Wis. 2d at 550, or because they do not know the identify of the person who has wronged them, *see Borello*, 130 Wis. 2d at 406-07. Accordingly, " '[d]iscovery' in most cases is implicit in the circumstances immediately surrounding the original misconduct." *Borello*, 130 Wis. 2d at 404-05 n.2.

Given this understanding of the discovery rule, we conclude that the rule does not save Ms. Pritzlaff's claim. At oral argument, counsel for Ms. Pritzlaff admitted that the following statement, taken from the Archdiocese brief, was a correct statement of Ms. Pritzlaff's claim:

> [T]he plaintiff has claimed that despite the awareness of the tortfeasor and the alleged tortious acts, despite this awareness, she was unable to connect her knowledge of the acts with her emotional harm, that it wasn't until '92 that she connected her psychological, emotional difficulties.

Taking this allegation as true,[3] as we must for the purposes of this case, Ms. Pritzlaff still does not prevail. Ms.

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[3] "[I]t must be noted that the vast majority of priests and ministers of all religions lead responsible lifestyles above reproach. And a substantial percentage of allegations of clergy sexual abuse which do receive investigation, prove later to be retracted or impossible to prove. This has been the experience of the largest insuror of churches." James T. O'Reilly & Joann M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 St. Thomas L. Rev. 31, 37 (1994) (footnotes omitted).

Pritzlaff, by her own admission, knew the identity of the tortfeasor and the conduct by the tortfeasor. Further, she claims that the sexual relationship was "without her consent" and was a result of "force and coerc[ion]." Of course, she must allege this as fact because a consensual sexual relationship between two adults is no longer actionable in Wisconsin. *See* Sec. 768.01, Stats.;[4] *Koestler v. Pollard*, 162 Wis. 2d 797, 802-04, 471 N.W.2d 7 (1991) (abolition of claims under sec. 768.01, Stats. evinces a legislative intent that "dictates that courts should not administer heart balm in the form of civil liability"). However, if in fact the sexual acts were a product of "force and coerc[ion]", then the contact was immediately actionable as either a civil battery or an offensive bodily contact. *See* Wis. JI-Civil 2005; Wis. JI-Civil 2010 (approved 1960); *see also Marsha V. v. Gardner*, 231 Cal. App. 3d 265, 272-73 (Cal. App. 1991); *Doe v. R.D.*, 417 S.E.2d 541, 542 (S.C. 1992). Therefore, assuming her allegations are true, Ms. Pritzlaff could have alleged a complete cause of action against Fr. Donovan by the time the six year relationship ended.[5] That Ms. Pritzlaff was unaware of additional harm ("severe emotional distress") only created uncertainty as to the amount of damages and did not toll the period of limitations. *See Marsha V.*, 231 Cal. App. 3d at 273.

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[4] Causes of action for breach of contract to marry, alienation of affections and criminal conversation which accrued after 1971 were abolished by sec. 768.01, Stats. Thus, any claim based upon these statutes is either abolished if it accrued in 1992 or untimely if it accrued earlier.

[5] Ms. Pritzlaff does not allege that she repressed what occurred. Therefore, even if she repressed the "coercive nature" of the relationship until 1992, Abrahamson, J., dissent slip op. at 2-3, she did not repress the alleged fact that the sexual conduct was a result of "force" and was "without her consent." Forced sexual contact in and of itself causes actual damage.

In support of her claim that the discovery rule should apply, Ms. Pritzlaff relies primarily on *Byrne v. Bercker*, 176 Wis. 2d 1037, 501 N.W.2d 402 (1993). There, this court held that the plaintiff's claim was barred because, "it is undisputed, indeed it is acknowledged in plaintiff's brief, that plaintiff was aware by mid-1986 [more than two years before she commenced her action] that her difficulties stemmed from incestuous abuse by her father and that she had been told that she was the victim of the abuse and was not the perpetrator." *Byrne*, 176 Wis. 2d at 1046.

However, the *Byrne* court also stated its approval of the holding of the court of appeals in *Hammer v. Hammer*, 142 Wis. 2d 257, 418 N.W.2d 23 (Ct. App.), *rev. denied*, 144 Wis. 2d 257, 418 N.W.2d 23 (1987). Often cited nationally,[6] *Hammer* put the Wisconsin courts at the forefront of allowing claims of incest to proceed to trial long after the alleged events.[7]

In *Hammer*, a woman alleged that she was sexually abused by her father from the age five to age of fourteen (1969-78). *Hammer*, 142 Wis. 2d at 261. She reported this activity to her mother in 1978, but both her father and mother denied the conduct and trivialized it. *Id.* "He convinced Laura that she was not injured by the conduct but that she was at fault for her problems and for the family's problems." *Id.* The plaintiff "alleged that during

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[6] *See e.g. Blackowiak v. Kemp*, 528 N.W.2d 247, 253 (Minn. App. 1995); *D.P. v. M.J.O.*, 640 N.E.2d 1323, 1327 (Ill. App. 1 Dist., 1944); *Weathers v. Fulgenzi*, 884 P.2d 538, 542 (Okla. 1994); *Farris v. Compton*, 652 A.2d 49, 63 n.24 (D.C. App., 1994); *Sawtell v. E.I. Du Pont De Nemours and Co., Inc.*, 22 F.3d 248, 250 n.6 (10th Cir., 1994).

[7] Comment, *Lemmerman v. Fealk: A "Reasonableness" Solution Allows Michigan's Incest Victims Greater Access to the Courts*, 71 U. Det. Mercy L. Rev. 943, 954 (1994).

the course of the abuse, . . . she was unable to perceive or know the existence or nature of her psychological and emotional injuries. These manifestations continued to operate on her long after the incidents, . . . preventing her from perceiving her psychological and emotional injuries and their connection to her father's earlier acts." *Id.* at 261-62. She commenced suit in 1985. The court of appeals held "that a cause of action for incestuous abuse will not accrue until the victim discovers, or in the exercise of reasonable diligence should have discovered, the fact and cause of the injury." *Id.* at 264.

The *Hammer* decision was codified in 1987. Section 893.587, Stats. (1993-94) provides:

> **893.587 Incest; limitation.** An action to recover damages for injury caused by incest shall be commenced within 2 years after the plaintiff discovers the fact and the probable cause, or with the exercise of reasonable diligence should have discovered the fact and the probable cause, of the injury, whichever occurs first.

Thus, in cases alleging incest, a plaintiff may rely on the discovery rule to avoid a motion to dismiss on the pleadings where she alleges that she was unable to forge a connection between the abuse and her latent emotional injuries despite the exercise of reasonable diligence, even though the plaintiff does not allege that she repressed all memories of the abuse.

One aspect of *Hammer* gives us pause. The defendant in *Hammer* asserted that the statute of limitations should have begun to run because the plaintiff in that case discovered, or should have discovered, the injury when the abuse ended after she reported it to her mother. *Hammer*, 142 Wis. 2d at 261, 267. The court of appeals dismissed this argument with one sentence, stating that a

"claimant has leeway to not start an action until she knows more about the injury and its probable cause." *Id.* at 267 (*citing Borello*, 130 Wis. 2d at 420). However, the *Hammer* court took this statement by the *Borello* court out of context.

The *Borello* court cited this statement in explaining that the discovery rule had been informally recognized in at least one case prior to *Hansen*. *Borello*, 130 Wis. 2d at 420. That case was *Wisconsin Natural Gas v. Ford, Bacon & Davis Construction Corp.*, 96 Wis. 2d 314, 291 N.W.2d 825 (1980). There the plaintiff discovered a "casing short" in a pipeline installed by the defendant more than six years (the applicable statute of limitations) prior to commencing suit. *Id.* at 318-19. Based on testimony that such shorts are a "usual phenomena" and may result from factors other than improper pipeline installation, this court held that a single "casing short" did not give the plaintiff sufficient knowledge that the defendant had committed a tortious act, thus the statute of limitations did not begin to run at that point. *Id.* at 325. Instead, the statute of limitations began to run when the evidence of injury was "sufficiently significant to alert the injured party to the possibility of a defect." *Id.* Thus, the statement in *Borello* that a "claimant ha[s] leeway to not start action until it knows more about the injury and its probable cause," *Borello*, 130 Wis. 2d at 420, does not mean that a plaintiff can delay action until the extent of the injury is known, but only, consistent with the explanation of the discovery rule above, that the statute of limitations does not begin to run until the plaintiff has sufficient evidence

that a wrong has indeed been committed by an identified person.[8]

Moreover, the *Hammer* decision and its subsequent codification are best viewed as a specialized discovery rule applicably only to cases of incest. The rule focuses on the unique harms and relationships between the tortfeasor and victims which exist in cases of incest. For example, what is unfortunately a fairly typical fact scenario in incest cases was described in *Hammer*. There, the conduct occurred in secret and was accompanied by threats that harm would come to the victim if she ever told anyone about it and the victim was repeatedly told that she had caused the acts and that they were her fault. *Hammer*, 142 Wis. 2d at 261; *see also* Note, *The Statute of Limitations Barrier in Civil Suits Brought by Adult Survivors of Child Sexual Abuse: A Simple Solution*, 1994 U. Ill. L. Rev. 417, 421 (1994). Further, because of these relationships and types of factual situations, and because of the age of the victims, oftentimes victims do not realize the wrongfulness of the acts. Note, *Forging the Causal Link: Reasonable Delay in Commencing Action for Childhood Sexual Abuse*, 27 Suffolk U. L. Rev. 749, 760 n.55 (1993). Thus, for reasons of public policy, a special discovery rule has been created for these cases in an effort to provide adequate protection to children who "have been harmed because of a 'most egregious violation of the parent/child relationship.' " *Hammer*, 142 Wis. 2d at 267 (*quoting* Com-

[8] This court was not faced with a similar potential defense in *Byrne* because there the plaintiff alleged that she had repressed all memory of the alleged abuse. *Byrne*, 176 Wis. 2d at 1039. Further, even if that defense had been presented, the legislative intent to codify the *Hammer* decision would have made such a defense untenable.

ment, *Tort Remedies for Incestuous Abuse*, 13 Golden Gate U. L. Rev. 609, 631 (1983)).

But here sound public policy requires that the discovery rule should not save a claim under the facts of this case. This court has stated that the discovery rule will apply only when allowing meritorious claims outweighs the threat of stale or fraudulent actions. *Hansen*, 113 Wis. 2d at 559. Extending the discovery rule to this case would cause unfairness to a defendant who is forced to attempt to defend a suit for emotional and psychological injuries in which the alleged conduct took place over twenty-seven years ago and increase the potential for fraud.

Any time a claim is raised many years after the injury occurred, the potential for fraud is exacerbated. However, in most cases that potential is at least limited by the fact that the plaintiff is suffering from physical symptoms that a jury can see evidence of and which can be directly traced to the tortious conduct. For example, the IUD in *Hansen* caused pelvic inflammatory disease, and the furnace in *Borello* caused a myriad of respiratory problems. But here the alleged damages are all "emotional" and "psychological," with the plaintiff's experts claiming that damage exists and was caused by the defendant, and the defendant left in the position of attempting to prove either that the plaintiff is not "emotionally damaged" or that he is not the cause of that damage. "While some courts may have blind faith in all phases of psychiatry, this court does not." *Steele v. State*, 97 Wis. 2d 72, 97, 294 N.W.2d 2 (1980). "Nor are we convinced that even careful cross-examination in this esoteric and largely unproved field is likely to reveal the truth." *Id.*

Such circumstances are ripe for fraudulent claims even when the alleged cause of the injury occurred only weeks prior to the initiation of suit. When one adds to this that

"this court has frequently been dismayed by the examination of trial court records which showed a marked propensity of those who purport to have psychiatric expertise to tailor their testimony to the particular client whom they represent," *id.*, fraud becomes a distinct possibility. Thus, unlike in *Hansen*, allowing what could be meritorious claims of this nature does not outweigh the threat of stale or fraudulent actions.

Although not relied upon by Ms. Pritzlaff, we feel it is necessary in order to fully explain the law related to this subject to distinguish this case from the closely analogous conduct prohibited by the sexual exploitation by a therapist statutes. Those statutes, enacted in 1985, provide in part:

> **895.70 Sexual exploitation by a therapist.** (1) DEFINITIONS. . . . (e) "Therapist" means a . . . member of the clergy . . . who performs or purports to perform psychotherapy.
>
> (2) CAUSE OF ACTION (a) Any person who suffers, directly or indirectly, a physical, mental or emotional injury caused by, resulting from or arising out of sexual contact with a therapist who is rendering or has rendered to that person psychotherapy, . . . has a civil cause of action against the psychotherapist . . . .
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> **893.585 Sexual exploitation by a therapist.** (1) . . . an action under s. 895.70 for damages shall be commenced within 3 years after the cause of action accrues or be barred.
>
> (2) If a person entitled to bring an action under s. 895.70 is unable to bring the action due to the effects of the sexual contact or due to any threats . . . from the therapist, the period of inability is not part of the time limited for the commencement of the action, except that this subsection shall not extend the time limitation by more than 15 years.

These statutes may be somewhat in conflict with the discovery rule as described above. One possible reason for this is that this statute, like the incest statute, is designed to protect a class of persons who the legislature feels need special protection. People who consult therapists generally do so because they perceive that they have a mental or psychological problem and hope that the therapist has the means and the method to help them. The therapists have been the exponents of the theory that sexual exploitation can result in suppression of memory of such acts and psychological problems arising out of feelings of guilt that are suppressed and buried. The assumed fact that therapists are aware of such potential results leaves them with no excuse for using their professional position to obtain sexual gratification from their vulnerable patients. Thus, there is a rational basis for subjecting therapists to special statutory provisions in an attempt to reduce or eliminate such exploitation of their patients. Regardless of the reason for the statute, the limited scope of the statute supports the explanation of the discovery rule above. The legislature enacted the provision well after the discovery rule had been announced by this court. Therefore, its enactment demonstrates that the legislature concluded that the discovery rule would not apply to sexual exploitation by therapists absent legislative action.

Since we conclude that Ms. Pritzlaff's claim is time barred, we could end our analysis at this point. However, the question of whether a religious governing body is liable for negligence in hiring, retaining, training or supervising their "employees" (clergymen) who commit acts which are outside the scope of their employment is a matter of great public importance and has been fully briefed by the parties. *See In Matter of Guardianship of L.W.*, 167 Wis. 2d 53, 66, 482 N.W.2d 60 (1992) (issues of great public

importance may be decided even if moot). Moreover, the decision of the court of appeals in this case is in conflict with a decision issued the same day by a different panel of the court of appeals. *Compare Pritzlaff v. Archdiocese of Milwaukee*, Appeal No. 93-1846 (Ct. App. Aug. 23, 1994) *with Jane Doe v. Archdiocese of Milwaukee*, Appeal No. 93-2074 (Ct. App. Aug. 23, 1994). Further, a number of cases of this sort are pending, both at circuit courts and at the court of appeals. *See In Matter of Guardianship of L.W.*, 167 Wis. 2d at 67 (issue may be decided although moot where the issue is likely to arise again and should be resolved by the court to avoid uncertainty). Thus, although the point is moot in this particular case, it is an issue which led this court to grant review in this case. Therefore, a decision is appropriate.

We conclude that even if Ms. Pritzlaff's claim were not time barred, it would still fail to state a claim against the Archdiocese upon which relief could be granted. Ms. Pritzlaff alleges that the Archdiocese was negligent in the hiring, training and supervision of Fr. Donovan. This court has not determined whether such a cause of action exists in Wisconsin. *See Midwest Knitting Mills, Inc. v. U.S.*, 950 F.2d 1295, 1298 (7th Cir., 1991). However, for purposes of this case we assume, but do not decide, that it does,[9] and we look to other courts for the elements of the claim.

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[9] More precisely, we assume that the cause of action existed at the time of the alleged conduct by Fr. Donovan. *See Duncan v. Steeper*, 17 Wis. 2d 226, 116 N.W.2d 154 (1962) (court required to allow the defense of charitable immunity because the defense was recognized when the tort was committed); *Isley v. Capuchin Province*, 880 F. Supp. 1138, 1154 (E.D. Mich. 1995) (applying Wisconsin law to a delayed discovery claim).

To establish a claim for negligent hiring or retention, Ms. Pritzlaff would have to establish that the Archdiocese was negligent in hiring or retaining Fr. Donovan because he was incompetent or otherwise unfit. *Id.* But, we conclude that the First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices. Therefore, Ms. Pritzlaff's claim against the Archdiocese is not capable of enforcement by the courts.

The rationale for this rule was recently aptly summarized by a pair of commentators as follows:

> Examining the ministerial selection policy, which is 'infused with the religious tenets of the particular sect,' entangles the court in qualitative evaluation of religious norms. Negligence requires the court to create a 'reasonable bishop' norm. Beliefs in penance, admonition and reconciliation as a sacramental response to sin may be the point of attack by a challenger who wants a court to probe the tort-law reasonableness of the church's mercy toward the offender. . . . The tort of negligent selection of unsuitable teachers has been recognized in civil courts. If negligent selection of a potential pedophile for the religious office of priest, minister or rabbi is a tort as to future child victims, will civil courts also hear Title VII challenges by the non-selected seminarian against the theological seminary that declines to ordain a plaintiff into ministry because of his psychological profile? How far shall the courts' qualitative entanglement with religious selectivity extend?

O'Reilly & Strasser, *supra*, at 47 (footnotes omitted).

Our conclusion is consistent with the principles enunciated by our founders as well as with nearly a century of United States Supreme Court jurisprudence. As Thomas

Jefferson wrote in 1808, the government is "interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline or exercises." O'Reilly & Strasser, *supra*, at 44 (*quoting* Letter of Thomas Jefferson to Reverend Samuel Miller (Jan. 23, 1808), in 5 Phillip Kurland & Ralph Lerner, *The Founders' Constitution* 98 (1987)). As early as 1929 the United States Supreme Court held that it is the function of church authorities to determine what the essential qualifications of a clergy person are and whether the candidate possesses them. *Gonzalez v. Roman Catholic Archdiocese of Manila*, 280 U.S. 1, 16 (1929). More recently, the United States Supreme Court has stated, "[f]reedom to select the clergy . . . must now be said to have federal constitutional protection as part of the free exercise of religion against state interference." *Kedroff v. St. Nicholas Cathedral of Russian O. Ch.*, 344 U.S. 94, 116 (1952); *see also Rayburn v. General Conf. of Seventh Day Adventists*, 772 F.2d 1164, 1167-68 (4th Cir., 1985), *cert. denied* 478 U.S. 1020 (1986) (the right to choose clergy without government restriction underlies the well-being of the religious community), *but see Moses v. Diocese of Colorado*, 863 P.2d 310, 320, 328 (Colo. 1993), *cert. denied*, 114 S.Ct. 2153 (1994) (First Amendment did not preclude negligent hiring claim where Diocese knew of priest's problems of depression, low self-esteem, and his struggle with his sexual identity).

Recent decisions of the courts of this state also support our conclusion that negligent hiring and retention claims cannot be heard by courts in this state for constitutional reasons. *See Olston v. Hallock*, 55 Wis. 2d 687, 696-97, 201 N.W.2d 35 (1972) (court could not constitutionally review a religious institution's decision to terminate a minister); *Black v. St. Bernadette Congregation*, 121 Wis. 2d 560, 565-66, 360 N.W.2d 550 (Ct. App. 1984) (matters

of internal church government are at the core of ecclesiastical affairs and as such are beyond the province of judicial review); *see also Isley*, 880 F.Supp. at 1150-51 (E.D. Mich. applying Wisconsin law).

Although state inquiry into the training and supervision of clergy is a closer issue than inquiry into hiring and retention practices because under some limited circumstances such questions might be able to be decided without determining questions of church law and policies, it is nonetheless prohibited by the First Amendment under most if not all circumstances.[10] As one court stated in refusing to allow a claim for negligent supervision:

> [A]ny inquiry into the policies and practices of the church Defendants in hiring or supervising their clergy raises the same kinds of First Amendment problems of entanglement discussed above, which might involve the court in making sensitive judgments about the propriety of the church Defendants' supervision in light of their religious beliefs. . . . The traditional denominations each have their own intricate principles of governance, as to which the state has no right of visitation. Church governance is founded in scripture, modified by reformers over almost two millennia.
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> . . .
>
> It would therefore also be inappropriate and unconstitutional for this Court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant Bishop. Any award

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[10] Even if it were not, there is a possibility that Ms. Pritzlaff would not recover on her claim. At least one state has held that employers are not liable for failure to supervise when the employee engages in independent criminal conduct which results in the plaintiff's injuries. *See Tichenor v. Roman Catholic Church of New Orleans*, 32 F.2d 953, 960 (5th Cir., 1994) (explaining Miss. law).

> of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative of the text and history of the establishment clause.

Schmidt v. Bishop, 779 F. Supp. 321, 332 (S.D.N.Y., 1991); *see also Roppolo v. Moore*, 644 So.2d 206, 208 (La. App. 4 Cir. 1994) (*quoting* the United States Supreme Court decision in *Watson v. Jones*, 13 Wall. 679, 729, 20 L.Ed. 666 (1871)) (recognizing the threat of harassing lawsuits and a potential for a "chilling effect" on the free exercise of religion if the courts are to determine after the fact that ecclesiastical authorities negligently supervised or retained a member of the clergy).

We are aware of the fact that several courts have recently held that a religious governing body could be held liable for negligent supervision where the plaintiff alleges that the body knew that the individual clergyman was potentially dangerous. *See* O'Reilly & Strasser, *supra*, at 49-51 (collecting cases from New York, Colorado and Ohio). The rationale of these courts is summarized by the following quote from the Ohio Supreme Court, "even the most liberal construction of the First Amendment will not protect a religious organization's decision to hire someone who it knows is likely to commit criminal or tortious acts." *Byrd v. Faber*, 565 N.E.2d 584, 590 (Ohio, 1991). However, we find these cases unpersuasive, at least given the facts of this case.

Further, one state that recognizes the tort of negligent supervision provides that employers do not have a duty to supervise when the employees are off-duty or not working. *See Tichenor*, 32 F.3d at 960 (explaining Miss. law). Problems of excessive entanglement seem inevitable if the court is asked to determine whether a priest, minister

or rabbi was on or off duty when he engaged in conduct that was against the laws of the religious denomination and beyond the scope of his employment.

In conclusion, our holding is limited to the following issues. We hold that Ms. Pritzlaff's claim against the Archdiocese is time barred. We further hold that, assuming they exist at all, the tort of negligent hiring and retention may not be maintained against a religious governing body due to concerns of excessive entanglement, and that the tort of negligent training or supervision cannot be successfully asserted in this case because it would require an inquiry into church laws, practices and policies. Therefore, we reverse that portion of the decision of the court of appeals which remanded the case for a trial on the negligent supervision claim against the Archdiocese.

By the Court—The decision of the court of appeals which remanded the case against the Archdiocese for a trial on the negligent supervision claim is reversed.

Justice Janine P. Geske took no part.

[Filed June 27, 1995]

No. 93-1846

STATE OF WISCONSIN : IN SUPREME COURT

JUDITH M. PRITZLAFF,

Plaintiff-Appellant,

v.

ARCHDIOCESE OF MILWAUKEE,

Defendant-Respondent-Petitioner,

REVEREND JOHN T. DONOVAN,

Defendant-Respondent,

ARIZONA HEALTH CARE COSTS CONTAINMENT SYSTEM AND HEALTH CARE FINANCING ADMINISTRATION,

Defendants.

HEFFERNAN, CHIEF JUSTICE (dissenting). I dissent because the majority apparently has misread the allegations of the plaintiff's complaint.

As the majority correctly states, plaintiff alleges, ". . . she has suppressed and been unable to perceive the existence . . . of her psychological and emotional injuries until approximately April, 1992." (Majority slip opinion, p. 4).

The allegation is plain that she did not "perceive" her injuries until April of 1992. If this allegation is true, a

matter that must eventually be decided at trial, she has brought her action within the period of limitations.[1]

The majority would object to this result because it relies on the discovery rule, i.e., that a cause of action does not accrue until the victim is not only aware of the injury but also must be aware of the cause of the injury.

That statement of the discovery rule is substantially correct, but the majority would insist that, because plaintiff alleges that she knew of the coerced sexual episode when it occurred and knew the identity of the tortfeasor, the cause of action accrued instanter. This overlooks the allegation that it was not until April of 1992 that she "perceive[d] the *existence* of her psychological and emotional injuries."

As I understand the complaint, it does not seek damages for whatever injury or trauma was occasioned at the time of the alleged sexual misconduct. It seeks damages for emotional and psychological harm which subsequently ensued and which could not be objectively associated with the original misconduct until decades later.

Thus the plaintiff alleges a harm of which she was unaware until 1992. Whether that allegation is in fact true must be decided by a factfinder not by a court on motion to dismiss. The majority opinion by its reference to the pleadings demonstrates that a material fact is in dispute.

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[1] We also point out that the explanation or supplementation of the claim at oral argument (see slip opinion page 11) is legally irrelevant at this stage of the proceedings. Neither party on oral argument in this court can amend its pleadings to either defeat or facilitate an order to dismiss. I believe it highly irregular to utilize the material referred to; and, of course, as pointed out, it is irrelevant.

The majority would further insist that the discovery rule, were it technically applicable, should, as a matter of public policy, not be applied to permit a litigant to get to a jury on so stale a claim. There is much philosophically to support the majority's position. Memories grow faint and proof is more difficult to produce as time passes, but the burden of proof is on the plaintiff and not upon the defendant. Also, the particular type of tort alleged is an emotionally charged one that may have a tendency to skew memories and stir old emotions. However, from a legal viewpoint, such problems can be handled by a factfinder, judge or jury, by appropriate instructions that caution a jury to be mindful that the lapse of time and the emotionally charged nature of the tort should be considered when evaluating evidence produced by either the plaintiff or defendant, bearing in mind the proper allocation of the burden of proof.

I share the majority's skepticism of proof that may be offered in a case of this kind,[2] but that is not sufficient reason to ignore a claim which is actionable by the application of the discovery rule.

The majority urges that the bringing of a stale claim is contrary to public policy. Of course, all causes of action that rely on the discovery rule are, in the absence of that rule, stale claims. They are, however, not stale if they have accrued, as is alleged here, within the period

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[2] The refreshing or stimulation of latent memories upon the goading of "therapists" is sometimes suspect. The possibility of suggesting a scenario to a disturbed and injured person should be carefully scrutinized by courts and juries, and it is the factfinder, usually the jury, who should pass upon the credibility of the evidence. It is not the function of this court to do so unless evidence presented is incredible as a matter of law.

of limitations. It is accepted as good public policy, as enunciated by the legislature, to allow claims to go forward if the claim has accrued, as appears from the face of the complaint, within the three-year period of limitations.

Moreover, as we stated in *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 560, 335 N.W.2d 578 (1983), the discovery rule is to be applied to all cases except where the legislature has specifically provided otherwise. It has not done so in respect to the facts here. Rather than furthering public policy the majority contravenes the public policy determined by the legislature.

While I understand the sentiments of the majority, the position taken is legally insupportable. Accordingly I dissent.[3]

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[3] The dissenting opinion of Justice Abrahamson points out that Donovan's case is not before us. She also points out that the majority reached the conclusion that therefore this action against the Archdiocese is barred. It seems to me that the appropriate disposition of this case, in view of its posture in this court, is to dismiss as improvidently granted.

[Filed June 27, 1995]

No. 93-1846

STATE OF WISCONSIN : IN SUPREME COURT

JUDITH M. PRITZLAFF,

Plaintiff-Appellant,

v.

ARCHDIOCESE OF MILWAUKEE,

Defendant-Respondent-Petitioner,

REVEREND JOHN T. DONOVAN,

Defendant-Respondent,

ARIZONA HEALTH CARE COSTS CONTAINMENT SYSTEM AND HEALTH CARE FINANCING ADMINISTRATION,

Defendants.

Shirley S. Abrahamson, J. (dissenting). I dissent because I conclude as did the court of appeals, that the factual dispute regarding the plaintiff's discovery of her claim against Donovan (the priest) should be determined at trial. I also conclude that the court should not, at this stage of the proceeding, decide the plaintiff's claims against the Archdiocese.

Before I proceed to discuss these issues, I must point out that this case is in an odd procedural posture. The court of appeals remanded the case for a full trial on the plaintiff's claims against Donovan. Donovan did not seek review in this court in a timely fashion. Only the Archdiocese sought review. After the time for the petition for review expired Donovan then petitioned this court to join

the Archdiocese's petition for review. Because the time for his petition for review had expired and there was no procedure for extending that time, this court refused to allow Donovan to join in this review of the decision of the court of appeals. It would therefore appear that the cause of action against Donovan may proceed even after this decision. Should a circuit court absolve Donovan of liability, the plaintiff's claims against the Archdiocese necessarily fail. I therefore conclude that the majority opinion may very well be premature in deciding the cause of action against the Archdiocese.

With regard to the statute of limitations issue, the majority aptly acknowledges that the discovery rule "tolls the statute of limitations until the plaintiff discovers . . . that he or she has suffered actual damage . . . ." Majority op. at 10. The majority, however, determines that the rule does not apply in this case because it fails to apply the well-settled rule that courts liberally construe the allegations presented in the complaint and accept them as true for purposes of determining whether a claim is stated. *Paskiet v. Quality State Oil Co.*, 164 Wis. 2d 800, 805, 476 N.W.2d 867 (1991).

The plaintiff claims that her coping mechanisms prevented her from being able to perceive the actual damage caused by Donovan's alleged sexual advances until April 1992. She also alleges that Donovan used his position as a priest to coerce her into a sexual relationship. Accepting both of these allegations as true leads to the conclusion that the plaintiff was not cognizant of the coercive nature of the relationship until 1992. If, as the plaintiff asserts, she was unaware of actual damage until 1992, she could not have had a claim capable of enforcement in 1965, according to our prior cases.

Instead, the majority opinion states that sound public policy requires that the discovery rule is not applicable to the case. Majority opinion at 16. The majority suggests that claims of emotional and psychological injury are more easily subject to fraud than claims of physical injury. Majority op. at 18. Thus the majority opinion rests on grounds long discarded by this court in other cases. *See, e.g., Bowen v. Lumbermens Mut. Cas. Co.*, 183 Wis. 2d 627, 636-61, 517 N.W.2d 432 (1994) (discussing the history of the court's treatment of emotional distress in an action for negligent treatment of emotional distress).

The defendants counter Pritzlaff's claims in a more straightforward manner, suggesting that she could have discovered her injury and its cause at any time and that the statute of limitations therefor bars the suit. As the court of appeals concluded, "[t]he factual impasse between Pritzlaff's knowledge of the events and her professed inability to relate them to her injuries presents a factual issue inappropriate for determination on a motion to dismiss. . . . Therefore, it was inappropriate for the trial court to dismiss the action without a full determination of the facts." *Pritzlaff v. Archdiocese of Milwaukee and Reverend John T. Donovan*, Court of Appeals opinion filed August 23, 1994 at 7.

After deciding that the Archdiocese cannot be held liable because the statute of limitations bars the cause of action against Donovan, the court reaches out to discuss other issues that do not affect the decision of the case.

The court refuses to decide a straightforward issue of state tort law, that is whether the state recognizes a tort of negligence in hiring, retaining, training or supervising employees. But, the majority eagerly reaches out to decide a federal constitutional issue. The majority holds that

if such a tort existed in this state, it would be barred in this case by the First Amendment. Thus the court engages in a "double reach."

The majority's reaching out to decide a First Amendment constitutional issue in this manner violates basic rules of judicial decisionmaking. A court will ordinarily not consider constitutional issues unless such a decision is essential to the determination of the question before the court. *State v. Hamilton*, 120 Wis. 2d 532, 540, 356 N.W.2d 169 (1984). The majority concedes that its determination of this claim is not essential. Majority op. at 20.

A court should be especially reluctant to volunteer to tackle a First Amendment issue relating to establishment of religion and the prohibition of the free exercise of religion. It is generally acknowledged that this area of First Amendment law is in flux and the United States Supreme Court cases offer very limited guidance.

For the reasons set forth, I cannot join the majority opinion.

(Letterhead Of)

SUPREME COURT OF WISCONSIN
P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880

MARILYN L. GRAVES
CLERK

SEPTEMBER 19, 1995

TO: * * * * *

YOU ARE HEREBY NOTIFIED THAT THE COURT ENTERED THE FOLLOWING ORDER:

DISTRICT 1
PRITZLAFF, J. v. ARCHDIOCESE- 93-1846

THE COURT HAVING CONSIDERED THE MOTION FOR RECONSIDERATION FILED BY THE PLAINTIFF-APPELLANT AND THE RESPONSE FILED BY THE DEFENDANT-RESPONDENT-PETITIONER,

IT IS ORDERED THAT THE MOTION FOR RECONSIDERATION IS DENIED WITH COSTS.

Justices Janine P. Geske and Ann Walsh Bradley did not participate.

MARILYN L. GRAVES
CLERK OF SUPREME COURT

Supreme Court, U.S.
FILED
JAN 19 1996
CLERK

(2)

No. 95-981

In The

Supreme Court of the United States

October Term, 1995

JUDITH M. PRITZLAFF,

Petitioner,

v.

ARCHDIOCESE OF MILWAUKEE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Wisconsin Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this Court have jurisdiction to review the Wisconsin Supreme Court's decision, which dismissed petitioner's claims against the Archdiocese of Milwaukee arising out of an adult sexual relationship between the petitioner and a priest that allegedly occurred between 1959 and 1965, when that decision was based first on Wisconsin's statute of limitations, second on state public policy grounds and third on the First Amendment to the United States Constitution?

2. Does this Court have jurisdiction to review the Wisconsin Supreme Court's decision on the basis that the decision allegedly violates the petitioner's equal protection and due process rights when (a) neither the equal protection nor the due process challenge was presented to or ruled upon by the Wisconsin Supreme Court and (b) both claims are meritless?

PARTIES TO THE PROCEEDING

The parties before the Wisconsin Supreme Court were Judith M. Pritzlaff and the Archdiocese of Milwaukee. In addition, Reverend John T. Donovan and Arizona Health Care Costs Containment System and Health Care Financing Administration appeared in the proceedings before the lower courts.

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The respondent Archdiocese of Milwaukee ("Archdiocese") opposes the grant of a writ of certiorari to review the Wisconsin Supreme Court's decision in this case.

OPINION BELOW

The petitioner has requested review of the decision of the Wisconsin Supreme Court in *Pritzlaff v. Archdiocese of Milwaukee, et al.*, 194 Wis. 2d 303, 533 N.W.2d 780 (1995).

JURISDICTIONAL STATEMENT

The Wisconsin Supreme Court's decision was issued on June 27, 1995. The Wisconsin Supreme Court denied the petition for rehearing on September 19, 1995. The petitioner asserts that this Court has jurisdiction to review the judgment of the Wisconsin Supreme Court pursuant to 28 U.S.C. § 1257(a), and that the Court can entertain the petitioner's equal protection and due process challenges to the Wisconsin Supreme Court decision, raised for the first time in this petition, under *N.A.A.C.P. v. State of Alabama Ex. Rel. Patterson*, 357 U.S. 449 (1958).

This Court should not review the Wisconsin Supreme Court's decision in *Pritzlaff* because it was based upon adequate and independent state law grounds and the judgment will therefore remain unaltered even if this Court disagrees with the Wisconsin Supreme Court's interpretation of federal law. This Court should also decline to entertain the petitioner's due process and

equal protection challenges to the Wisconsin Supreme Court's decision because those challenges were not presented to the Wisconsin Supreme Court (or the lower courts), and because they are meritless.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Wis. Stats. § 330.205 (1963):

330.205 Within Three Years. Within three years:

> (1) an action to recover damages for injuries to the person for such injuries sustained on or after July 1, 1995 . . .

Wis. Stats. § 893.54 (1993-1994):

> **893.54 Injury To the Person.** The following actions shall be commenced within three years or be barred:
>
> (1) an action to recover damages for injuries to the person.

United States Constitution, Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . .

Wisconsin Constitution, Article I, Section 18:

> The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference

> with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

United States Constitution, Amendment 14:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

Judith M. Pritzlaff sued the Archdiocese of Milwaukee and Father John Donovan on November 12, 1992, seeking to recover for claims arising out of an adult sexual relationship that allegedly occurred between Father Donovan and Pritzlaff from 1959 to 1965. *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis. 2d 303, 533 N.W.2d 780 (1995). Pritzlaff alleged that Father Donovan had used his relationship with Pritzlaff and his position as a priest to force and coerce her to have a sexual relationship with him without her consent. *Id.*, 194 Wis. 2d at 310. She further alleged that the psychological distress caused by the sexual advances and the coping mechanisms that she subsequently developed combined to cause her to suppress and be unable to perceive the existence, nature

or cause of her psychological and emotional injuries until approximately 1992. *Id.*

On April 26, 1993 the trial court granted the Archdiocese's motion to dismiss Pritzlaff's claims, finding that (1) Pritzlaff's respondeat superior and negligent supervision claims against the Archdiocese failed to state a claim upon which relief could be granted and (2) all of Pritzlaff's claims were barred by the statute of limitations and/or failed on public policy grounds. *Id.* at 311-312. On April 23, 1994, the Wisconsin Court of Appeals held that Pritzlaff's claims were not barred by the statute of limitations, and similarly reversed the trial court's finding that Pritzlaff could not state a claim for negligent supervision against the Archdiocese. *Id.* at 312. The court of appeals affirmed the trial court's decision that Pritzlaff could not state a respondeat superior claim against the Archdiocese, agreeing the alleged sexual acts were, as a matter of law, outside the scope of Father Donovan's employment relationship with the Archdiocese. *Id.* The Archdiocese petitioned the Wisconsin Supreme Court to review the Court of Appeals' decision on the statute of limitations and negligent supervision issues. Pritzlaff did not appeal the decision on respondeat superior, and that issue was therefore not reviewed by the Supreme Court. *Id.*

On review, the Wisconsin Supreme Court reversed the Court of Appeals' decision, affirming the trial court's dismissal of Pritzlaff's claims on statute of limitations, public policy and First Amendment grounds.

The Wisconsin Supreme Court found, first, that Pritzlaff's claims were untimely under Wisconsin's three year

statute of limitations, Wis. Stats. § 330.205 (1963) and its successor, Wis. Stats. § 893.54 (1993-94). Pritzlaff asserted that the statute of limitations should be tolled under Wisconsin's judicially created discovery rule (which tolls the statute of limitations in some circumstances when the claimant does not discover and is unable to discover the nature and cause of an injury) because Pritzlaff allegedly had "suppressed and been unable to perceive the existence, nature or cause of her psychological and emotional injuries until approximately April, 1992." *Id.* at 316. The Wisconsin Supreme Court disagreed, holding that the discovery rule did not apply:

> We conclude that Ms. Pritzlaff's claim does not qualify for the tolling of the statute of limitations provided by the discovery rule because Ms. Pritzlaff knew of all of the elements of her underlying claim against Father Donovan, at the latest, by the time the relationship between the two ended. *Id.*

The Wisconsin Supreme Court affirmed the dismissal of Pritzlaff's claims, second, on state public policy grounds:

> But here sound public policy requires that the discovery rule should not save a claim under the facts of this case. This court has stated that the discovery rule will apply only when allowing meritorious claims outweighs the threat of stale or fraudulent actions. [*Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 559, 335 N.W.2d 578 (1983)]. Extending the discovery rule to this case would cause unfairness to a defendant who is forced to attempt to defend a suit for emotional and psychological injuries in which the alleged

> conduct took place over 27 years ago and increases the potential for fraud. *Id.* at 323.

Having disposed of Pritzlaff's claims on statute of limitations and public policy grounds, the Wisconsin Supreme Court then turned to the merits of her claims, addressing the issue of whether a religious governing body could be liable for negligence in hiring, retaining, training or supervising clergy who commit acts which are outside the scope of their employment. The Court addressed the issue, despite the fact that it was *"moot in this particular case"* because the Court found that the issue was one of great public importance, which had been fully briefed by the parties, and because there was a conflict among different panels of the state court of appeals. *Id.* at 326 (emphasis added). The Court also noted that it had not yet determined whether a negligent supervision claim exists in Wisconsin under any circumstances, and that it would assume, but not decide, that such a claim did exist for purposes of addressing whether it could ever be applied in this situation. *Id.* at 326-327.

The Wisconsin Supreme Court concluded that the First Amendment to the United States Constitution prevents Wisconsin state courts from entertaining a claim that the Archdiocese was negligent in hiring or retaining Father Donovan:

> [T]he First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation of church canons and internal church policies and practices. Therefore, Ms. Pritzlaff's claim against the

> Archdiocese is not capable of enforcement by the courts. *Id.* at 327.

The Court noted, further, that state court decisions supported its conclusion:

> Recent decisions of the courts of this state also support our conclusion that negligent hiring and retention claims cannot be heard by courts in this state for constitutional reasons. *Id.* at 329.

The Wisconsin Supreme Court never reached the other two issues now raised by the petitioner, whether the Equal Protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution require the Wisconsin Supreme Court to apply its judicially created discovery rule to Pritzlaff's claims, because those issues were never presented to the lower courts or to the Wisconsin Supreme Court. (*See*, Plaintiff-Appellant's Brief to the Wisconsin Supreme Court, Appendix, Item 2). The petitioner did not even raise the equal protection and due process challenges in her Motion for Reconsideration to the Supreme Court of Wisconsin. (*See*, Plaintiff-Appellant's Motion for Reconsideration, Appendix at pages 3-4).

ARGUMENT

I. THE WISCONSIN SUPREME COURT'S DECISION TO DISMISS PRITZLAFF'S CLAIMS SHOULD NOT BE REVIEWED BECAUSE IT WAS BASED UPON INDEPENDENT STATE LAW GROUNDS ADEQUATE TO SUPPORT THE JUDGMENT AND, MOREOVER, BECAUSE THE WISCONSIN SUPREME COURT'S ANALYSIS OF THE FEDERAL CONSTITUTIONAL ISSUES WAS CORRECT.

A. *Pritzlaff* was Decided on Adequate and Independent State Grounds.

The Wisconsin Supreme Court dismissed the petitioner's claims because they were untimely under Wisconsin's statute of limitations and barred on state public policy grounds. The Wisconsin Supreme Court also dismissed Pritzlaff's negligent supervision claim against the Archdiocese on federal constitutional grounds. The court's decision to dismiss on statute of limitations and public policy grounds constitutes an independent state basis adequate to support the judgment, and the United States Supreme Court therefore should *not* exercise jurisdiction to review the case. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977) (a case decided on independent state law grounds will not be reviewed, even if it decides federal questions, because review would amount to nothing more than an advisory opinion); *Jankovich v. Indiana Toll Road Com.*, 379 U.S. 487 (1965) (an independent and adequate state ground of decision deprives the Supreme Court of jurisdiction).

A state court's decision that an action fails under the state statute of limitations is ordinarily not reviewable, even if federal questions are also reached, because the

state statute of limitations provides an adequate and independent state law basis for the decision. *See Seneca Nation v. Christy*, 162 U.S. 283 (1896) (decision that suit is barred by the state statute of limitations rested upon a distinct and independent ground, precluding review); *Elder v. Wood*, 208 U.S. 226 (1908); *Rogers v. Jones*, 214 U.S. 196 (1909); *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100, 101-102 (1973), *reh'g denied*, 414 U.S. 1138 (1974) (remanding case to the Oklahoma Supreme Court to clarify whether the Oklahoma statute of limitations was an independent basis for the court's decision, because "if that should prove to be the case, any decision by this Court would be advisory and beyond our jurisdiction.").

In this case, the Wisconsin Supreme Court disposed of Pritzlaff's claims first and foremost on state statute of limitations grounds. The court held that Pritzlaff's claims were barred by Wisconsin's three-year statute of limitations for negligence claims, and the court further held that Wisconsin's judicially created discovery rule would not save such claims. This Court should not review Wisconsin's decision, therefore, because the state statute of limitations constitutes an adequate ground for the judgment, independent of the federal constitutional issue, and the judgment would stand even if the Court ultimately disagreed with the Wisconsin Supreme Court's interpretation of the federal constitutional question.

This Court should also refuse to review the *Pritzlaff* Court's decision because the decision was also grounded in state public policy. Not only did the Supreme Court find that Pritzlaff's claims were time barred, but it also found that Wisconsin's discovery rule could not apply to such claims under any circumstances because to permit a

27-year old claim to survive would be contrary to Wisconsin's public policy:

> We conclude that to allow the claim to proceed against the Archdiocese based on Ms. Pritzlaff's allegations concerning Father Donovan despite the passage of 27 years since the end of the alleged relationship would be contrary to the public policy of this State. *Pritzlaff*, 194 Wis. 2d at 308.
>
> * * *
>
> [S]ound public policy requires that the discovery rule should not save a claim under the facts of this case. This Court has stated that the discovery rule will apply only when allowing meritorious claims outweighs the threat of stale or fraudulent actions. Extending the discovery rule to this case would cause unfairness to a defendant who is forced to attempt to defend a suit for emotional and psychological injuries in which the alleged conduct took place over 27 years ago and increase the potential for fraud. *Id.* at 323.

The Wisconsin Court's decision not to extend the application of the judicially created discovery rule to Pritzlaff's claims on state public policy grounds, like its decision that the claim fails under the state statute of limitations, is a sufficient and independent state ground which bars further review in the United States Supreme Court.

If there is any question as to whether the statute of limitations and public policy grounds form an adequate and independent basis for the judgement, moreover, this Court need only look to the Wisconsin Supreme Court's decision in *Pritzlaff*. Before the Supreme Court addressed

the issue of whether a negligent supervision claim against the Archdiocese survived a constitutional challenge, it first explained that it was addressing the issue, *even though it was moot*, because it was a matter of importance to the state:

> Since we conclude that Ms. Pritzlaff's claim is time barred, we could end our analysis at this point. However, the question of whether a religious governing body is liable for negligence in hiring, retaining, training or supervising their "employees" (clergymen) who commit acts which are outside the scope of their employment is a matter of great public importance and has been fully briefed by the parties. . . . Moreover, the decision of the Court of Appeals in this case is in conflict with the decision issued the same day by a different panel of the Court of Appeals. . . . Thus, *although the point is moot in this particular case*, it is an issue which led this court to grant review in this case. Therefore, a decision is appropriate. *Pritzlaff*, 194 Wis. 2d at 326 (citations omitted) (emphasis added).

No decision by this Court will render Pritzlaff's claims viable under Wisconsin law, and the Court should therefore decline the petitioner's invitation to issue an advisory opinion.

B. The Wisconsin Supreme Court Properly Held that a Negligent Supervision Claim Against the Archdiocese of Milwaukee Cannot be Maintained Consistent with the First Amendment of the United States Constitution and Article I, Section 18 of the Wisconsin Constitution.

In addition to dismissing Pritzlaff's claims on statute of limitations and public policy grounds, the Wisconsin Supreme Court also held that Pritzlaff could not maintain a negligent supervision claim against the Archdiocese of Milwaukee consistent with the First Amendment to the United States Constitution:

> [T]he tort of negligent hiring and retention may not be maintained against a religious governing body due to concerns of excessive entanglement and. . . . The tort of negligent training or supervision cannot be successfully asserted in this case because it would require an inquiry into church laws, practices and policies. *Pritzlaff*, 194 Wis. 2d at 331.

As an initial matter, this Court should also decline review of the constitutional issue because the decision on that issue was based not only on the U.S. Constitution but also on the Wisconsin Constitution. *See Jankovich v. Indiana Toll Road Com.*, 379 U.S. 487, 491-492 (1965) ("[E]ven though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment"). The respondents had urged the Wisconsin Supreme Court to find that the negligent supervision claim was barred both

under the First Amendment to the United States Constitution and under Article I, Section 18 of the Wisconsin Constitution, (*see* Respondent's Brief to the Wisconsin Supreme Court, Appendix pages 43-51), and the Wisconsin Court in fact referred to state court decisions in support of its conclusion. *See Pritzlaff*, 194 Wis. 2d at 329. The State Constitution therefore provides an adequate and independent basis for the rejection of the negligent supervision claim.

In any event, this Court should decline review of the Wisconsin Supreme Court's ruling that a negligent supervision claim cannot be maintained against the Archdiocese because the court properly held that the First Amendment to the United States Constitution and Article 1, Section 18 of the Wisconsin Constitution preclude the Wisconsin courts from recognizing the tort of negligent supervision in this context. To support a negligent supervision claim, the plaintiff would have to establish that the Archdiocese was negligent in selecting or retaining Father Donovan, because he in turn was incompetent or otherwise unfit. *Midwest Knitting Mills, Inc. v. U.S.*, 950 F.2d 1295, 1298 (7th Cir. 1991).[1] The courts cannot constitutionally determine what makes one competent or fit to

---

[1] Case law from other jurisdictions must be relied upon to define the elements of this tort because, as the *Pritzlaff* Court noted, the Wisconsin Supreme Court has not determined whether such a cause of action exists in Wisconsin in *any* context. *Pritzlaff*, 194 Wis. 2d at 326. That fact, incidentally, provides further evidence that a decision that the Wisconsin Supreme Court erroneously determined the First Amendment issue would not result in reversal of the judgment in *Pritzlaff*.

act as a Catholic priest, however, and the claim therefore cannot be recognized.

This Court has consistently held that the Free Exercise clause of the First Amendment prohibits government interference into issues surrounding the selection of clergy by religious institutions, since such selections involve legitimate religious beliefs. *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929) (it is the function of church authorities to determine what the essential qualifications of a clergy person are and whether the candidate possesses them). *See also Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 711-12 (1976) (*citing Gonzalez*); *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952) ("Freedom to select the clergy . . . must now be said to have federal constitutional protection as part of the free exercise of religion against state interference.")[2]

Under *Gonzalez*, it is clear that the free exercise rights of the Archdiocese and the Catholic Church are at issue whenever a court undertakes to address the selection, supervision and training of Catholic priests. It is the function of the Catholic Church to determine what the

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[2] *See also Olston v. Hallock*, 55 Wis. 2d 687, 201 N.W.2d 35 (1972) (court could not constitutionally review a religious institution's decision to terminate a minister); *Black v. St. Bernadette Congregation*, 121 Wis. 2d 560, 565, 360 N.W.2d 550 (Ct. App. 1984) (matters of internal church government are at the core of ecclesiastical affairs and as such are beyond the province of judicial review); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1167-68 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986) (the right to choose clergy without government restriction underlies the well-being of religious community).

essential qualifications of its priests are and it is also the function of Church authorities to determine how to supervise and train these priests to best meet the needs of the Church. This Court must accept those determinations as conclusive, and cannot constitutionally rule that the Archdiocese improperly trained, selected or supervised its priests.

Not only are free exercise rights at issue, moreover, but the First Amendment also prohibits courts from determining whether religious authorities negligently supervised clergy because such a determination may involve civil authorities in unconstitutional excessive entanglement with religious authorities. In *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 711-712 (1976), the Supreme Court explained that where the resolution of civil disputes cannot be made without extensive inquiry by civil Courts into religious law and policy, the First and Fourteenth Amendments mandate that the civil courts not disturb decisions of religious authorities. *Id.* at 708. And in *Schmidt v. Bishop*, 779 F. Supp. 321, 332 (S.D.N.Y. 1991), the court specifically rejected a negligent supervision claim against religious authorities on excessive entanglement grounds.

In *Schmidt*, the plaintiff alleged that religious authorities had negligently supervised a pastor who had initiated sexual contact during a counseling relationship. The court held that the First Amendment prohibited it from determining whether the ecclesiastical authorities negligently supervised the pastor, due to the problem of excessive entanglement:

> Any inquiry into the policies and practices of the church defendants in hiring or supervising their clergy raises the same kinds of First Amendment problems of entanglement discussed above, which might involve the court in making sensitive judgments about the propriety of the church defendant's supervision in light of their religious beliefs.
>
> * * *
>
> It would therefore also be inappropriate and unconstitutional for this court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant Bishop. Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative of the text and history of the establishment clause.

Id. at 332.[3]

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[3] Similarly, in *Dausch v. Rykse*, 1993 U.S. Dist. LEXIS 1448, *20 (N.D. Ill.), *aff'd in part, rev'd in part*, 52 F.3d 1425 (7th Cir. 1994), a federal district court applying Illinois law ruled that a similar negligent supervision claim failed, among other reasons, because of the potential for excessive entanglement. The Seventh Circuit Court of Appeals affirmed this decision without specifically addressing whether such a claim is barred by the First Amendment. In a dissent, however, Judge Ripple argued that, while an inquiry could be made into the church's decision to employ the clergyman in a purely secular capacity – as a psychotherapist – no inquiry could constitutionally be made into the decision of the church defendants to retain the clergyman to perform services in any way religious in nature. *See also Roppolo v. Moore*, 644 So.2d 206, 208 (La. Ct. App. 4th Cir. 1994) (recognizing the chilling effect on the free exercise of religion if the courts are to determine after the fact that ecclesiastical

The *Pritzlaff* court similarly rejected negligent supervision claims on First Amendment grounds because permitting such claims would invite excessive entanglement of the state into religious matters by permitting a court to review the sufficiency of the Archdiocese's supervision of its priests. Wisconsin had previously recognized that it cannot constitutionally review the decision of a religious institution to terminate a minister (*Olston v. Hallock*, 55 Wis. 2d 687, 698, 201 N.W.2d 35 (1972)) and, this decision – that the court cannot constitutionally review the decision to hire, or how to supervise, a priest – was a logical extension of that rule. The trial courts are not equipped, nor should they be required, to inquire into the essential characteristics of a priest or how the Church should screen and supervise its clergy.

The petitioner's attack on the reasoning of the Wisconsin Supreme Court is based largely on false premises and unsupported assumptions. The most fundamental of these unsupported assumptions is the implicit argument that there *must* be a way to hold the Archdiocese liable for abuse allegedly committed by a priest. In the first place, nothing in *Pritzlaff's* First Amendment analysis prevents a lawsuit against the allegedly intentional tortfeasor. More importantly, there is no basis for the implication that there *must* be a tort of negligent supervision.[4] As set forth above, the *Pritzlaff* court assumed

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authorities negligently supervised or retained a member of the clergy).

[4] The petitioner claims that there is a "basic and universal premise that religious organizations are liable for their torts." Not in Wisconsin: until 1963 – four years into this allegedly

without deciding that such a claim would be recognized in Wisconsin (it has not yet been recognized – *Midwest Knitting Mills, Inc. v. U.S.*, 950 F.2d 1295 (7th Cir. 1991)), and then held that even if it were recognized it would not be applied against religious institutions. It is the province of the Wisconsin Supreme Court to decide the theories of liability under which an employer may be held liable for the torts of its employees and as of now it has not recognized a tort of negligent supervision in any circumstances.

In addition, the petitioner misleadingly argues that the religious beliefs of the Archdiocese would not be implicated in a lawsuit for its allegedly negligent supervision of a priest alleged to have abused a parishioner because "the Archdiocese does not and cannot claim that sexual contact between a priest and parishioner is mandated, authorized or supported by church law." (Petition p. 6). In fact, of course, the religious beliefs of the Catholic Church *prohibit* sexual contact between a priest and a parishioner, and the religious beliefs of the Church *are* implicated both when that prohibition is violated and when the state attempts to regulate the Archdiocese's response to (and alleged failure to foresee and prevent) the violation. The religious beliefs that are implicated include the choice of how to respond to such a violation and more fundamentally the right of the Archdiocese to choose its priests, and to determine when to retain them and how to supervise them. That much should have been

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tortious six year relationship – religious organizations such as the Archdiocese enjoyed charitable immunity. *See Widell v. Holy Trinity Catholic Church*, 19 Wis. 2d 648, 121 N.W.2d 249 (1963).

obvious to the petitioner from the arguments that the Archdiocese made to the Wisconsin Supreme Court, and the Wisconsin Supreme Court's decision.[5]

Finally, the petitioner demonstrates a fundamental misunderstanding of the *Pritzlaff* court's decision, and of First Amendment jurisprudence, when she states time and time again, in a number of not so different ways, that holding the church liable for alleged negligent supervision of priests would not in any way impinge upon the church's discretion in selecting and supervising priests. (*See, e.g.*, Petition, p. 20, "The church's authority to govern the church is one thing; immunity for secular harm to third parties based upon these decisions is quite another." *See also*, p. 23, "While the church is free to determine who is competent and qualified to be a priest, and that decision is binding upon the party seeking such appointment under church law governance, if the church's appointment results in secular harm to a third party, the church is

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[5] The petitioner also launches an unfortunate and unwarranted attack on the Wisconsin Supreme Court, describing the Wisconsin Supreme Court's decision as, among other things, "gratuitous," "irrelevant," "jurisdictionally unfortunate" and "unsupported and self-serving." The petitioner also accuses the Wisconsin Supreme Court of relying "almost exclusively on a Law Review article" (Petition p. 7) and relying "upon selected quotes . . . taken out of context" from United States Supreme Court decisions. This insulting attack on the Wisconsin Supreme Court has no place in appellate advocacy, and it is meritless. The Wisconsin Supreme Court in *Pritzlaff* was presented with and presumptively considered the relevant authority. The court even acknowledged that other courts had reached contrary decisions, but declared that "we find these cases unpersuasive." *Id.* at 331.

liable.") In reality, as the Wisconsin Supreme Court properly held, recognizing a negligent supervision claim in these circumstances would require courts not only to involve themselves in an impermissible review of the selection and supervision of clergy after the fact, but also involve the courts in legislating the kind of selection and training criteria that are acceptable in the first place. The resolution of such a claim would require the court to inquire into religious disputes and impose upon the internal church body the State's preference as to who is qualified to serve as a cleric. That is impermissible.

II. THE SUPREME COURT SHOULD NOT ACCEPT REVIEW TO DETERMINE WHETHER THE WISCONSIN SUPREME COURT'S DECISION VIOLATES EQUAL PROTECTION OR DUE PROCESS BECAUSE THOSE ISSUES WERE NOT PRESENTED TO OR RULED UPON BY THE WISCONSIN SUPREME COURT AND BECAUSE THE ARGUMENTS ARE PLAINLY WITHOUT MERIT.

The Supreme Court should not issue a writ of certiorari based upon petitioner's argument that the Wisconsin court's decision violates her equal protection and due process rights because those issues were not presented to or ruled upon by the Wisconsin Supreme Court.

As a general proposition, in order to obtain review pursuant to 28 U.S.C. § 1257(a), a petitioner must first present a federal claim to the state court and obtain a ruling from the state court. *See, e.g., Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (The Supreme Court will not pass upon a federal claim unless the claim was adequately presented in the

state system, and when the state court has failed to pass upon a federal question it is assumed that it was due to want of proper presentation); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 76 (1988) (the Supreme Court will not decide federal claims that were not pressed or passed upon below). As is evident from petitioner's brief to the Wisconsin Supreme Court and her brief on rehearing, her equal protection and due process claims were never presented to the Wisconsin Supreme Court. (Brief of Plaintiff-Appellant Judith M. Pritzlaff Appendix at pages 43-51; and, Plaintiff-Appellant's Motion for Reconsideration Appendix at pages 52-65). This Court should therefore not entertain petitioner's challenge to the Wisconsin Supreme Court's decision on equal protection or due process grounds.

The Court should also decline to entertain a challenge to the Wisconsin court's decision on equal protection and due process grounds because petitioner's claims are meritless. To sustain Supreme Court jurisdiction under 28 U.S.C. § 1257(a), a federal question may not be one of mere form, but rather it must be real and substantial. *See Ennis Water Works v. Ennis*, 233 U.S. 652 (1914); *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390 (1952). A federal question is not substantial if it is plainly without foundation or merit. *Ennis Water Works*, 233 U.S. at 658.

The petitioner argues that *Pritzlaff* violates equal protection by creating an impermissible distinction between victims of incest and victims of abuse by a cleric. The petitioner's equal protection claim is meritless because *Pritzlaff's* decision not to apply the statute of limitations to non-incest sexual assault cases rests upon the rational and justifiable distinction between incest victims and other abuse victims. *See, e.g., Clements v. Fashing*, 457 U.S.

957, 967 (1982) ("only those classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause of the Constitution"); *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 408 (1982) (rejecting equal protection challenges to New Jersey statute of limitations because it was rationally related to legitimate government ends).

It is neither arbitrary nor irrational for the Wisconsin courts to distinguish between the unique relationship of child to parent and the relationship of adult parishioner to priest, or for that matter the relationship of any person of any age with an adult in a position of arguable trust or authority, such as priests, school teachers, psychologists or police. In fact, the Wisconsin legislature has recognized incest as a separate type of crime warranting specific and separate treatment in this identical context (*see* Wis. Stats. § 893.587 codifying the discovery rule in incest cases) and in other contexts, *see e.g.*, Wis. Stats. § 948.06. The legislature has also recognized the unique nature of the parent-child relationship, or guardian-child relationship, by providing for special laws governing that relationship such as Wis. Stats. § 948.06(2), which makes it a felony for a parent or guardian to fail to act upon knowledge of sexual abuse. *See also* Wis. Stats. §§ 948.20 and 948.21, 948.22. The decision to create a special discovery rule for incest cases but not for other cases of sexual assault, like the other laws directed specifically at the parent-child relationship, is based on a recognition of the unique nature of that relationship, and therefore does not violate equal protection.

The petitioner's due process argument warrants even less response. The petitioner appears to be arguing, first, that the dismissal of her claim short of trial in and of

itself violates due process. This Court long ago made it clear, however, that dismissal of claims short of trial is not a violation of due process rights: "It was not a denial of a right protected by the Constitution of the United States to refuse a jury trial." *Iowa Central Railway Co. v. Iowa*, 160 U.S. 389 (1896).

The second argument, that the *Pritzlaff* decision somehow violates the due process prohibition against "requiring a person to swear to a fact that the individual cannot be expected to know," is sheer nonsense. The petitioner cites *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961) for the proposition that *Pritzlaff* violates her due process rights. *Gremillion* invalidated a law that *required* a person registering an organization with the state to file an affidavit stating that none of the officers of any out-of-state association with which it is affiliated is a member of a communist or subversive organization – a feat impossible for an organization with many thousands of members. This petitioner, on the other hand, was not *required* by the state court to swear to anything, and the petitioner has cited no authority that otherwise undermines the authority of a state court to dismiss claims on statute of limitations grounds on the pleadings.

The real point of this supposed due process argument is that, had the Wisconsin Supreme Court properly construed the pleadings under controlling Wisconsin law, it would have determined that the discovery rule applies. That is not a due process challenge, but rather a request that the U.S. Supreme Court overturn *Pritzlaff* because the state court supposedly erroneously applied its own law. As set forth above, however, this Court is not in the business of reviewing state court decisions construing

state law, and the Wisconsin Supreme Court is under no federal obligation to extend its statute of limitations for 27 years based upon allegations such as those set forth by *Pritzlaff*, or any other allegations. The Wisconsin Supreme Court has determined that the state court judicially crafted discovery rule does not apply under these circumstances, and cannot apply on public policy grounds, and this Court is not free to review and overturn that decision on the basis that the Wisconsin court supposedly erroneously applied its own standards.

The equal protection and due process claims raised by the petitioner are plainly without foundation or merit, and the Supreme Court should not exercise jurisdiction under 28 U.S.C. § 1257 on so flimsy a basis.

CONCLUSION

This Court should decline the petitioner's invitation to review the Wisconsin Supreme Court's decision in *Pritzlaff v. Archdiocese, et al.*, because that decision rests, at its core, on independent and adequate state law grounds. Moreover, this Court should not entertain equal protection and due process challenges to the state court action when those challenges were not first presented to the state court. The petition should be denied.

Respectfully submitted this 19th day of January, 1996.

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SUPREME COURT OF WISCONSIN

JUDITH M. PRITZLAFF,

Plaintiff-Appellant,

v.

DISTRICT I
Case No. 93-1846
Trial Court Case No.
92-CV-016110

ARCHIDIOCESE OF MILWAUKEE,
Defendant-Respondent-
Petitioner,
REVEREND JOHN T. DONOVAN,
Defendant-Respondent,
ARIZONA HEALTH CARE COSTS
CONTAINMENT SYSTEM AND HEALTH
CARE FINANCING ADMINISTRATION,
Defendants.

BRIEF OF DEFENDANT-RESPONDENT-PETITIONER ARCHDIOCESE OF MILWAUKEE

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STATEMENT OF ISSUES

Issue No. 1: Does the discovery rule toll the running of the statute of limitations for 27 years in a case where the last tortious act allegedly occurred in 1965 and the plaintiff was always aware of the alleged breach of duty and the identity of the tortfeasor?

How Presented: Plaintiff-appellant Pritzlaff appealed a dismissal by the trial court, and the issue was briefed before the court of appeals.

How Decided: The court of appeals reversed the trial court, holding that it was error to conclude, applying the discovery rule, that plaintiff had failed as a matter of law to exercise reasonable diligence in discovering the connection between her injury and the alleged acts.

Issue No. 2: Did the trial court properly dismiss this 27 year old claim on public policy grounds?

How Presented: Pritzlaff appealed an adverse ruling; briefed by the parties before the court of appeals.

How Decided: The court of appeals reversed the trial court, holding that a sufficient factual basis was not presented for considering, evaluating and resolving the public policy issues involved in this case.

Issue No. 3: Did the trial court properly dismiss a claim for negligent supervision against the Archdiocese of Milwaukee, on the basis that Wisconsin has yet to recognize such a claim?

How Presented: Pritzlaff appealed an adverse ruling; briefed by the parties before the court of appeals.

How Decided: The court of appeals reversed the trial court, holding that the court of appeals has lawmaking power to recognize a claim for negligent supervision under these circumstances.

STATEMENT OF THE CASE

The plaintiff, Judith Pritzlaff, started this action in 1992 to recover for injuries arising out of an adult relationship she allegedly had with a priest beginning in 1959 and ending in 1965. The trial court, the Honorable John G. Bartholomew, dismissed the action on statute of limitations (and other) grounds. The court of appeals reversed, holding that it was error for the trial court to rule that the plaintiff, who was always aware of the alleged tortious conduct, *should* have discovered the nature and cause of her injury at some point more than three years prior to filing suit. The court of appeals also held that it was error to dismiss this 27 year old claim on public policy grounds

before a full factual determination at trial. Finally, the court of appeals held that it was error to rule that the plaintiff could not state a claim for negligent supervision against the Archdiocese of Milwaukee, holding instead that Wisconsin *does* recognize such a claim. This Court should reverse each of those rulings, and sustain the trial court's dismissal.

The plaintiff brought this suit against the Archdiocese of Milwaukee and Father John Donovan seeking to recover damages for a six year sexual relationship she allegedly had with Father Donovan thirty years ago. (Amended Complaint, App. p. 26, at ¶ 8).[1] This relationship allegedly began in 1959 when the plaintiff was an adult, and continued through 1965. (*Id.*). The plaintiff does not allege that she was sexually assaulted during this relationship. Realizing that a consensual sexual relationship is no grounds for a tort claim, however, the plaintiff ambiguously alleges that Father Donovan used "his position as a priest to force and coerce the plaintiff to have a sexual relationship with him without her consent." (*Id.* at ¶ 9).

As her theory of recovery against the Archdiocese of Milwaukee, the plaintiff asserted a respondeat superior claim and a negligent supervision claim. The plaintiff alleges that the Archdiocese had a duty:

> to admit only qualified candidates into the priesthood [and] properly test and screen candidates for the priesthood and priests to ascertain

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[1] All documents referred to in this brief (except published decisions) appear in the Petitioner's Appendix.

> if such persons had an illness or sexual inclination which caused a priest to be sexually attracted to teenage girls/young women. . . . (*Id.* at ¶ 16).

The plaintiff further alleges that the Archdiocese knew or should have known that Father Donovan "had a sexual problem prior to 1959." (*Id.* at ¶ 20).

The plaintiff did not sue during the course of the 6 year alleged relationship, from 1959 to 1965, nor did she sue immediately after it ended. Rather, she waited 27 years, until November of 1992, to bring this lawsuit. (Complaint, App. p. 33).

The plaintiff attempts to avoid the obvious statute of limitations bar presented by this 27 year delay by invoking the discovery rule. To invoke the discovery rule, however, the plaintiff does not allege that she repressed memory of this six year relationship, but rather alleges that this relationship caused psychological injuries which she was unable to discover until 1992:

> As a result of the psychological distress caused by the sexual advances and the coping mechanisms which were subsequently developed by Judith M. Pritzlaff, she has suppressed and been unable to perceive the existence, nature or cause of her psychological and emotional injuries until approximately April, 1992. (Am. Complaint at ¶ 11).

The Archdiocese filed a motion to dismiss, and Father Donovan joined the motion, contending that the plaintiff's complaint should be dismissed as untimely. (Brief in Support of Motion of the Archdiocese, App. p. 44, at 5). The Archdiocese also argued that the plaintiff's

complaint failed to state a claim either (a) for respondeat superior, because such a sexual relationship is clearly outside the scope of a priest's employment, or (b) for negligent supervision, because (i) the underlying conduct of Father Donovan was not tortious; (ii) Wisconsin does not recognize a claim for negligent supervision and should not recognize such a claim; and (iii) the plaintiff did not adequately plead such a claim. (*Id.* at 5-13).

In a memorandum decision filed on April 26, 1993, Judge Bartholomew dismissed the plaintiff's complaint. (Decision, App. p. 36; attaching Order filed May 26, 1993). The court dismissed the respondeat superior and negligent supervision claims against the Archdiocese as a matter of law, adopting the briefs of the Archdiocese as the basis for the decision. (*Id.* at 1-2). The court concluded that defendant Donovan could not have been acting within the scope of his employment, and that there was no basis to hold the Archdiocese liable on a theory of negligence, noting parenthetically that "it is most improbable that the Archdiocese, before Donovan was admitted to the seminary, should have foreseen that he had 'fancies concerning young women' or that Donovan had 'a sex problem' which did not manifest itself until 1959." (*Id.* at 2).

In addition to dismissing the claims against the Archdiocese for failure to state a claim, the court also found that all claims were barred by the statute of limitations, because the plaintiff had failed to exercise reasonable diligence in pursuing her claims, and on public policy grounds. (*Id.* at 4-7). The trial court explained that, although the plaintiff alleged that for 27 years she was unable to discover a nexus between her alleged injury

and the relationship, during this 27 year period the plaintiff was married, had children and was divorced or separated, all of which caused severe emotional distress for which she now blames the defendants. The court concluded that she did not exercise due diligence in discovering the connection, which she now claims to have discovered in 1992, between her emotional distress and the relationship which ended 27 years prior. (*Id.* at 5). The court also found that the claim should be dismissed on public policy grounds, citing *Coffey v. Milwaukee*, 74 Wis. 2d 526, 541, 247 N.W.2d 132 (1976).

On August 23, 1994 the Court of Appeals, District I, issued its opinion reversing the trial court's dismissal of all claims on statute of limitations and public policy grounds, and reversing the trial court's dismissal of the negligent supervision claim.[2] (App. p. 1). Despite the fact that the plaintiff was aware at all times of the alleged sexual relationship, the court of appeals found that her professed inability to relate her knowledge of that relationship to her injuries presented a factual issue inappropriate for determination on a motion to dismiss. The court therefore found that it was error for the trial court to determine, as a matter of law, that the plaintiff had failed to exercise reasonable diligence in discovering the cause of her injuries.

The court of appeals also reversed the trial court's decision to dismiss the action on public policy grounds. The court found that, in this case, a sufficient factual

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[2] The court of appeals affirmed the trial court's dismissal of the respondeat superior claim, and neither the petitioner nor the plaintiff has sought review of that decision.

basis was not presented for considering, evaluating and resolving the public policy issues involved in the case, and remanded for a full factual determination at trial.

Finally, the court of appeals reversed the trial court's dismissal of the negligent supervision claim, finding that Wisconsin should recognize a tort of negligent supervision under the circumstances presented in this case.[3]

ARGUMENT

The Supreme Court should reverse the decision of the court of appeals and affirm the trial court's dismissal on all grounds. The trial court correctly ruled, on a motion to dismiss, that the plaintiff's 27 year old claims were barred by the statute of limitations. The trial court also properly dismissed the claims on public policy grounds, and had the authority to do so on a motion to dismiss. Finally, the trial court properly dismissed the negligent supervision claim for failure to state a claim, and this Court should now refuse to recognize a cause of action for negligent supervision under the circumstances presented in this action.

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[3] Judge Sullivan, writing for the court, concluded that the negligent supervision claim stated no ground for relief because the Wisconsin Supreme Court had not explicitly recognized the tort of negligent supervision. Judge Fine, in a concurrence joined by Judge Schudson, disagreed, and that concurrence therefore constituted the opinion of the court on the negligent supervision issue.

I. THE PLAINTIFF'S CLAIMS WERE PROPERLY DISMISSED AS UNTIMELY.

The trial court dismissed the plaintiff's claims as untimely, holding that the plaintiff had failed to exercise reasonable diligence in pursuing her claim. This court should affirm that decision, first, because the discovery rule does not even apply to claims such as this, where the plaintiff is always aware of (a) the alleged breach of duty, (b) the identity of the tortfeasor and (c) some harm.[4] Even if the discovery rule does apply, second, the trial court properly ruled as a matter of law that the plaintiff, in the exercise of reasonable diligence, *should* have known of the nature and cause of her injury.

A. The Discovery Rule Does Not Toll The Running Of The Statute Of Limitations Where The Plaintiff Always Knows Of The Alleged Breach Of Duty And The Identify Of The Tortfeasor.

The plaintiff's claims, claims for injuries to the person, should have been brought within three years of the date of injury (1959 – 1965) under Wis. Stat. § 330.205 and its successor, § 893.205 (1965).[5] The plaintiff's claims,

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[4] *See e.g. Lecander v. Billmeyer*, 171 Wis. 2d 593, 602, 492 N.W.2d 167 (Ct. App. 1992) (the reviewing court may affirm a circuit court's decision even if the circuit court reached the result for different reasons).

[5] The applicable statutes of limitations are those that were in place when the alleged tortious activity occurred. *Kohnke v. St. Paul Fire & Marine Ins. Co.*, 144 Wis. 2d 352, 424 N.W.2d 191 (1988); *Betthauser v. Medical Protective Co.*, 172 Wis. 2d 141, 493 N.W.2d 40 (1992).

therefore, should have been filed in 1968, at the latest. Instead, they were filed in 1992, 27 years after the last alleged tortious act.

Realizing that the limitation period has long since expired, the plaintiff attempts to keep this 27 year old claim alive by resorting to the "discovery rule." To justify this untimely filing, however, the plaintiff does not allege that she was unaware of the identify of the tortfeasor or of the alleged tortious act – she admits that she was able to recall the relationship. Rather, the plaintiff has claimed that, despite this awareness, she was unable to connect her knowledge of the acts with her emotional harm.[6]

This court should affirm the trial court's dismissal of this action on statute of limitations grounds because the plaintiff's cause of action accrued in 1965, and expired in 1968. In Wisconsin, a cause of action accrues when there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a present right to enforce it. *Meracle v. Children's Serv. Socy. of Wis.*, 149 Wis. 2d 19, 437 N.W.2d 532 (1989). If this adult relationship was tortious (a disputed question of law),

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[6] The respondent alleged that she was unable to perceive the existence, nature or cause of her psychological and emotional injuries until 1992, but at the same time made the inconsistent allegation that Defendant Donovan caused her to suffer emotional distress by causing the break-up of her marriage and separation from her children. (Amended Complaint, ¶¶ 10, 11). The trial court reasonably interpreted these inconsistent allegations as an acknowledgement of awareness of injury, but as an allegation that the plaintiff was unable to connect the alleged acts with the resulting emotional harm until 1992. (*See*, Decision at 3).

then Pritzlaff had a cause of action in 1965. She had a claim for damages arising out of what she now describes as being "coerced" into a 6 year sexual relationship, she knew against whom to enforce that claim, and she had the right to attempt to enforce her claim.

While the plaintiff attempts to invoke the discovery rule, moreover, this court has never held that the discovery rule applies to cases such as this where the plaintiff always knew of some breach of duty, and of the identify of the alleged tortfeasor. This court created the discovery rule in *Hansen*, and clarified it in *Borello*, to remedy situations in which the plaintiffs knew that they were experiencing a harm, but could not discover that a duty owed to them had been breached.[7] In *Hansen v. A.H. Robins, Inc.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983), an individual could not discover that her injury was caused by the defendant's malfunctioning IUD until a doctor removed the IUD and informed the plaintiff that it had caused her injury. While the plaintiff knew in that case that she had an injury, and knew or could know the identity of the alleged negligent actor, she had no way of knowing that the actor had breached a duty to her until the doctor

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[7] The court has also applied the discovery rule to cases where the plaintiff was unable to identify the tortfeasor. *See, Kolpin v. Pioneer Power & Light Co.*, 162 Wis. 2d 1, 469 N.W.2d 595 (1991) (applying discovery rule to case where plaintiff eventually discovered, through process of elimination, that stray voltage from defendant's plant was cause of problems with herd); *Spitler v. Dean*, 148 Wis. 2d 630, 436 N.W.2d 308 (1989) (applying discovery rule to case where plaintiff was assaulted in February of 1984, but did not learn of the identify of his assailant until December of 1985).

removed the IUD. Similarly, in *Borello v. U.S. Oil Co.*, 130 Wis. 2d 397, 388 N.W.2d 140 (1986), the plaintiff was experiencing an injury and suspected that her furnace was the cause, but had no confirmation, because other physicians told her the furnace was not the cause, until her physician diagnosed her with metal fume fever. Again the plaintiff knew of the injury and the actor and even suspected a breach of duty, but had no way to confirm that breach of duty until diagnosed.

In this case, unlike *Hansen* and *Borello*, the plaintiff had nothing left to discover in 1965, and the discovery rule does not apply to preserve her claims. She allegedly knew that she and Father Donovan had just ended a six year relationship, which she claims was tortious. She therefore knew in 1965 of the alleged breach of duty – the relationship – and of the identify of the alleged tortfeasor – Fr. Donovan. *Hansen* and *Borello*, which held that the statute of limitations was tolled until the plaintiff could discover that someone had breached a duty, simply do not apply to cases where the plaintiff is aware for 27 years of the allegedly tortious acts.

B. The Plaintiff Failed To Exercise Reasonable Diligence In Discovering Her Claims.

If the discovery rule does apply, the trial court properly dismissed this claim as a matter of law on the basis that the plaintiff should have discovered her injury. Under Wisconsin law, a cause of action accrues when the plaintiff discovers, *or* in the exercise of reasonable diligence should have discovered, the fact of the injury and that the injury was probably caused by the defendant's

conduct. *Borello v. United States Oil Co.*, 130 Wis. 2d 397, 420, 388 N.W. 2d 140 (1986); *Hansen v. A. H. Robins, Inc.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983). The latter portion of the rule (which holds that claims accrue when they should have been discovered) is designed to protect defendants from stale or fraudulent claims:

> [T]he discovery rule . . . will not leave defendants unprotected from stale and fraudulent claims. Under the rule, a claim accrues when the injury is discovered or reasonably *should* have been discovered. Therefore, it does not benefit claimants who negligently or purposefully fail to file a timely claim.

Id. at 559 (emphasis in original).

Applying this rule, the trial court found that the plaintiff's claims were barred as a matter of law because, in the exercise of reasonable diligence, she *should* have discovered the connection between the alleged acts and her resulting injuries, since she was aware at all times of the alleged tortious acts. The court of appeals reversed, holding that the plaintiff's professed inability to connect the alleged tort with the alleged injury presented an issue of fact, and it was therefore error to rule as a matter of law that the claim was untimely.

Other decisions from this Court and the court of appeals, however, support the trial Court's decision to treat the issue of whether the plaintiff exercised reasonable diligence in discovering her claim as a matter of law. In *Hennekens v. Hoerl*, 160 Wis. 2d 144, 465 N.W.2d 812 (1991) this Court affirmed the trial court's decision on summary judgment that, as a matter of law, the plaintiff had failed to exercise reasonable diligence in discovering

his claim. *Id.* at 161, 167. The Court explained that when the facts and reasonable inferences that can be drawn from the facts are not in dispute, whether the plaintiff has exercised reasonable diligence is a question of law. *Id.* at 161. *See also, Byrne v. Bercker*, 176 Wis.2d 1037, 1045, 501 N.W.2d 402 (1993) (where the facts, even though material, are disputed, those facts nevertheless become irrelevant if, in giving full benefit to the party against whom summary judgment is sought, the claim nevertheless is barred as a matter of law). The Court found that the plaintiff's claim against his attorney for negligent representation in negotiating an agreement to purchase property accrued on the date that the plaintiff received notice of intent to foreclose from the seller, holding as a matter of law that it was *not* reasonable for the plaintiff to ignore such a letter:

> Instead of contacting an attorney to determine why Crotteau was pressing for payment for land Hennekens had not received, Hennekens simply ignored the October 13, 1991 demand letter. He did not exercise "such diligence as the great majority of persons would use in the same or similar circumstances." *Id.* at 167, 162-163.[8]

In our case, similarly, the trial court properly ruled as a matter of law that the plaintiff had failed to exercise reasonable diligence. Where it is undisputed, as here, that the plaintiff has always known of the identity of the

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[8] The court of appeals, similarly, has held that a court may rule as a matter of law that a plaintiff failed to exercise reasonable diligence in discovering her claim. *See, Groom v. Professional Ins. Co.*, 179 Wis. 2d 241, 249, 507 N.W.2d 121 (Ct. App. 1993); *Awve v. Physicians Ins. Co.*, 181 Wis. 2d 815, 823, 512 N.W.2d 216 (Ct. App. 1994).

alleged tortfeasor and of the alleged tortious acts, the plaintiff's claimed inability to discover the nexus between her emotional harm and the breach of duty is immaterial. By failing to act on the awareness of the alleged breach for 27 years, the plaintiff, like the plaintiff in *Hennekens*, failed to exercise reasonable diligence, and the trial court was entitled to so rule.

Courts in other jurisdictions, moreover, have refused to apply the discovery rule to toll the statute of limitations in cases involving allegations of sexual abuse because sexual abuse is the kind of tortious conduct which, as a matter of law, causes sufficient harm when it occurs to create a duty to investigate and institute suit. *See Marsha V. v. Gardner*, 281 Cal. Rptr. 473, 477, 231 Cal. App. 3d 265 (Cal. App. 1991) (Discovery rule did not apply where the plaintiff remembered sexual abuse, but alleged that her discovery of the psychological injuries and the causal link between the abuse and those injuries was delayed. The plaintiff remembered the abuse and therefore knew of a very real harm all along, and the fact that she was unaware of *additional* harm "only created uncertainty as to the amount of damages and did not toll the period of limitations."); *E.J.M. v. Archdiocese of Philadelphia*, 622 A.2d 1388 (Pa. Super. 1993); *DeRose v. Carswell*, 242 Cal. Rptr. 368, 196 Cal. App. 3d 1011 (1987).

In *E.J.M.*, the plaintiff alleged that he had been abused by a priest from 1976, when the plaintiff was 14, through 1981. 622 A.2d at 1389. The plaintiff did not sue until 1989, however, claiming that he did not become aware of the psychological and emotional injuries until 1988. *Id.* The *E.J.M.* court held that the plaintiff's claims were barred by the two year statute of limitations, even

under the discovery rule, explaining that the plaintiff could have (and should have) known of the injury:

> This is simply not a case where the plaintiff, despite the exercise of objectively measured reasonable diligence, *could not* know of his injury and its cause within the limitations period. *Id.* at 1394 (emphasis in original).

The plaintiff's claim was barred because he had not met his duty to investigate the problems resulting from the abuse. *Id.*

In *DeRose*, similarly, the court refused to apply the discovery rule to a situation where the plaintiff was always aware that she had been abused, explaining that the rule is designed to remedy situations where injury is inflicted without perceptible trauma. *DeRose*, 242 Cal. Rptr. at 371. Sexual assault or abuse is not such a situation, however, because the abuse causes harm as a matter of law when it occurs – it is not imperceptible like the bad medical device in *Hansen*. *Id.* at 371. A plaintiff who always recalls the abuse always knows of *some* harm, and who caused that harm, and therefore cannot claim that she did not or could not discover her cause of action.[9]

The *DeRose* decision is consistent with this Court's recent decision in *Byrne v. Bercker*, 176 Wis. 2d 1037, 501

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[9] *See also Doe v. R.D.*, 417 S.E.2d 541 (S.C. 1992) (Discovery rule did not apply where plaintiff was aware of sexual abuse all along. The rule does not toll the statute until the plaintiff knows the full extent of his injuries, only until he knows he was injured.); *E.W. v. D.C.H.*, 754 P.2d 817, 820 (Mont. 1988) (plaintiff who always knew she had been abused could not avail herself of the discovery rule because she had a duty to inquire into the injury).

N.W.2d 402 (1993) dismissing sexual abuse claims on statute of limitations grounds on a motion for summary judgment. In *Byrne*, the plaintiff alleged that she had completely repressed all memories of sexual abuse, which had occurred in the 1940's, until 1986. The court held, without deciding whether her claim of repression tolled the running of the statute of limitations, that the cause of action accrued at least by 1986 when she was admittedly aware that the psychological injury she had been experiencing had been caused by the abuse that she had repressed. *Id.* at 1043. In *Byrne*, like *DeRose*, once the plaintiff was aware of the sexual abuse and an injury, she was aware of all facts necessary to bring her claim.[10]

In this case, the Court should affirm the trial court's dismissal on statute of limitations grounds because, as a matter of law, in the exercise of reasonable diligence, the plaintiff *should* have discovered her claims. The plaintiff had constant knowledge of the alleged tortious act, the identity of the tortfeasor and at least some awareness of injury, and the court was therefore entitled to rule that plaintiff had failed to exercise reasonable diligence in connecting her injury to the alleged tortious acts.[11] In this

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[10] A claim that the plaintiff allegedly discovered the connection while in therapy, moreover, is no reason for tolling the statute of limitations. A plaintiff need not be informed by a psychologist or some other expert that the abuse caused the injury before the statute of limitations starts to run. *Clark v. Erdmann*, 161 Wis. 2d 428, 448, 468 N.W.2d 18 (1991); *Fritz v. McGrath*, 146 Wis. 2d 681, 690, 431 N.W.2d 751 (Ct. App. 1988); *see also Byrne*, 176 Wis. 2d at 1047.

[11] Several other trial courts have dismissed similar cases on similar grounds. Two similar cases fully briefed before the court

case, as in the cases from other jurisdictions cited above, the plaintiff was put on notice by the alleged tortious

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of appeals were dismissed at the trial court level on statute of limitations and public policy grounds. In *John MMM Doe v. Archdiocese of Milwaukee*, Appeal No. 94-0695, the plaintiff claimed to have been sexually abused between 1965 and 1967, and to have repressed all memory of the abuse until 1992. The trial court, the Honorable John E. McCormick, held that the claim was barred because the plaintiff had failed to take reasonable steps to discover the injury, and also held that permitting a claim to proceed after the passage of 28 years clearly violated public policy. (Orders for all decisions cited in this note appear in petitioner's appendix.) In *John BBB Doe v. Archdiocese of Milwaukee, et al.*, Appeal No. 94-0423, the plaintiff claimed to have been sexually abused between 1965 and 1969, and also claimed to have repressed all memory of the abuse until 1992. The trial court, the Honorable Laurence G. Gram, Jr., dismissed the claim as barred by the statute of limitations.

Six other cases were recently dismissed on statute of limitations and/or public policy grounds and are currently being appealed. On June 20, 1994, Judge John E. McCormick dismissed three cases as untimely on both statute of limitations and public policy grounds, as well as for failure to state a claim. The court dismissed *A.C. v. Archdiocese, et al.*, Appeal No. 94-2141, where the plaintiff claimed to have been abused in 1978 but did not sue until 1994; *T.C. v. Archdiocese, et al.*, Appeal No. 94-2124, where the plaintiff claimed abuse from 1980 through 1987, and sued in 1993; and *J.J. v. Archdiocese, et al.*, Appeal No. 94-2128, where the plaintiff claimed abuse in 1968, and sued in 1994. Similarly, Judge Laurence C. Gram, Jr., in *J.K. v. Archdiocese, et al.*, Appeal No. 94-2145, dismissed as untimely and on public policy grounds a claim by a plaintiff who alleged that he had been abused from 1966 to 1968, but did not sue until 1994. Judge Michael Barron in *T.K. v. Episcopal Diocese, et al.*, Appeal No. 94-2270, dismissed a 27 year old claim on statute of limitations and public policy grounds. Finally, Judge Frank T. Crivello in *Susan Smith v. Archdiocese, et al.*, Appeal No. 94-2384, likewise dismissed a 25 year old claim as untimely and on public policy

conduct of the need for action, and if she failed to discover her claims for 27 years, she also failed to exercise reasonable diligence.

II. THE TRIAL COURT ALSO PROPERLY DISMISSED THIS DECADES-OLD CLAIM ON PUBLIC POLICY GROUNDS.

This court should also affirm the trial court's dismissal because, as a matter of public policy, claims that are brought 27 years after the alleged tortious conduct should not be permitted to go forward. The court of appeals reversed the trial court's dismissal on policy grounds, finding that the trial court should not have reached this issue on a motion to dismiss. The court of appeal's decision should be reversed, however, because the trial court was within its authority and acted properly by dismissing this action on policy grounds.

In a recent decision, *Bowen v. Lumbermen's Mut. Cas. Co.*, 183 Wis. 2d 627, 654, 517 N.W.2d 432 (1994), this Court held that when public policy issues are presented on the pleadings, the trial court (and this Court) may make its determination on public policy grounds before trial. In *Bowen*, the Court held that a mother who came onto the scene of her son's fatal injury after the accident could state a claim for negligent infliction of emotional distress, and ruled, reviewing a decision on a motion to

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grounds. In addition, Justice Ceci, sitting as a reserve judge, dismissed a claim for sexual contact allegedly occurring from 1961 to 1990 on statute of limitations and public policy grounds. *Roger Roe v. Archdiocese, et al.*, Case No. 92-CV-006387 (not appealed).

dismiss, that the claim was not barred on policy grounds. The court explained why, in that case, it was permissible to determine the policy issues on a motion to dismiss:

> In this case the court is determining public policy considerations before trial because the facts presented are simple, and because the question of public policy is fully presented by the complaint and the motion to dismiss. The question is whether, under the circumstances of this case, it contravenes public policy to permit Sharon Bowen to recover for severe emotional distress. *Id.* at 655.

In this case, similarly, Judge Bartholomew found that the facts were sufficiently simple and fully presented to permit a decision on public policy grounds on a motion to dismiss, noting that this case "does not require an evidentiary hearing to conclude that plaintiff's claim should be laid to rest on public policy and legal grounds." (App., p. 36). The court cited *Coffey v. Milwaukee*, 74 Wis. 2d 526, 540-42, 247 N.W.2d 132 (1976), which allows the court to deny recovery on public policy grounds, holding that to permit recovery on this stale claim would "make a mockery of our justice system." In *Coffey*, and more recently in *Meracle*, supra, this Court has explained that recovery may be denied on grounds of public policy when, among other reasons, allowance of recovery would (1) place too unreasonable a burden upon defendants, (2) be too likely to open the way for fraudulent claims, or (3) enter a field that has no just stopping point. *Coffey*, 74 Wis. 2d 526, 540-542; *Meracle*, 149 Wis. 2d 19, 31.

In this case, faced with allegations of conduct which allegedly occurred 27 years ago, given no concrete event which would clearly define when the statute should run *other* than at the point of the alleged sexual contact, and given the strong potential for fraud and blackmail in allowing such claims to proceed after decades, the trial court properly found that the action was barred on policy grounds. Allowing claims to proceed after the passage of 27 years based only on an alleged inability to connect the tort with the injury would, as the trial court found, violate the policies delineated in *Coffey* and *Meracle* by: (1) placing defendants in the nearly impossible position of attempting to defend allegations after memories have faded and witnesses have died; (2) opening the door to fraudulent claims, for the same reasons; and (3) entering a field that has no stopping point by leaving the statute of limitations devoid of meaning and impossible to enforce.

The public policy behind the discovery rule itself, moreover, clearly supports dismissal of such a decades-old claim. The purpose of statutes of limitation is to ensure prompt litigation of claims and to protect defendants and the courts from fraudulent or stale claims brought after memories have faded or evidence has been lost or become obscured. *See Korkow v. General Cas. Co.*, 117 Wis. 2d 187, 334 N.W.2d 108 (1984); *Air Products & Chemicals, Inc. v. Fairbanks Morse, Inc.*, 58 Wis. 2d 193, 206 N.W.2d 414 (1973); *Gutter v. Semandel*, 103 Wis. 2d 1, 24, 308 N.W.2d 403 (1981). The creation of the discovery rule was premised on a balancing of the public policies of discouraging stale and fraudulent claims on the one hand, and protecting the meritorious claims of litigants who have been as diligent as possible on the other. *See*

Hansen, 113 Wis. 2d at 558. Permitting a claim to proceed after passage of 27 to 33 years, therefore, violates the very public policy that led to the creation of statutes of limitation, especially in a case where the plaintiff always knew of the alleged tortious conduct.[12]

Public policy especially supports the dismissal of the claims against the Archdiocese in this case. In a case involving allegations of child sexual abuse, the California court explained, in language applicable here, why the statute of limitations should *not* be extended in claims against the employer, even though it is tolled for the claims against the perpetrator:

> It is one thing to extend a statute of limitations to the individual primarily responsible for the plaintiffs injuries, and another to apply an open-ended period of limitations to the employer of the assailant. To allow lawsuits based on an employer's negligence in hiring, training and retraining an employee years after the abuse is alleged to have occurred, and, in many cases, years after the assailant's employment has ended, would, we believe, have serious economic repercussions which would stifle business growth. More importantly, it would deny such defendants a meaningful opportunity to defend against such accusations.

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[12] The purpose behind the statute of limitations is especially served by dismissal in a situation such as this, involving extremely old claims. Not only have memories faded and key witnesses, such as Archbishop Cousins, passed away, but in fact some of these events occurred so long ago that the Archdiocese enjoyed charitable immunity when much of the alleged conduct occurred (up to 1963). *See Widell v. Holy Trinity Catholic Church*, 19 Wis. 2d 648, 121 N.W.2d 249 (1963).

Debbie Reynolds Professional Rehearsal Studios v. Superior Court., 25 Cal App. 4th 222, 30 Cal Rptr. 2d 514 (1994).

In our case, similarly, the public policy weighs heavily against permitting the plaintiff to pursue her 27 year old claims, especially against the Archdiocese, who would be deprived of the opportunity to present a meaningful defense after so much time. In fact, our legislature has given a clear statement of its public policy decision that a claim such as the plaintiff's should not survive for more than 15 years by enacting Wis. Stat. §§ 895.70(4) and 895.585.[13] In 1985, two years after *Hansen*, the Wisconsin legislature created a cause of action for sexual exploitation by a therapist (which includes clergy in some circumstances), § 895.70 stats., but deliberately cut off *all* rights for plaintiffs suing under that statute at a point *15 years* from when the statute would ordinarily expire. Section 893.585 requires an action to recover for sexual exploitation to be brought within three years after it accrues, allowing for delayed accrual under the discovery rule. *Id.* at § 893.585(1), (2). Under no circumstances, however, can the statute of limitations be extended by more than 15 years. *Id.*

In this case, therefore, the court should reverse the decision of the court of appeals and affirm the trial

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[13] This statute could not apply to the Appellant's claim, even if she had alleged a therapy relationship with Father Donovan, because it was not created itself until 1985, 20 years after the last alleged tortious act, and there is no evidence it was intended to apply retroactively. *See In Re Paternity of C.J.H.*, 149 Wis. 2d 624, 628, 439 N.W.2d 615 (Ct. App. 1989); *Schulz v. Ystad*, 155 Wis. 2d 574, 597, 456 N.W.2d 312 (1990).

court's dismissal on policy grounds. Contrary to the position taken by the court of appeals, the trial court was entitled to rule on the public policy issue on a motion to dismiss and, moreover, properly dismissed this decades old claim on public policy grounds.

III. IN THE ALTERNATIVE, THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DISMISSAL OF THE PLAINTIFF'S NEGLIGENT SUPERVISION CLAIM.

In addition to ruling that the plaintiff's claims were barred as untimely and on policy grounds, the trial court also dismissed the plaintiff's negligent supervision claim because this Court has not recognized the tort of negligent supervision. *See, e.g., Midwest Knitting Mills, Inc. v. U.S.*, 950 F.2d 1295, 1298 (7th Cir. 1991) ("The Wisconsin Supreme Court has never explicitly recognized this tort by holding an employer liable for the negligent retention or supervision of an employee"). The court of appeals reversed, holding that it had lawmaking power to recognize such a claim, and that the trial court should at least permit the issue to be tried.[14]

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[14] In a decision issued the same day, however, a different panel of the court upheld a trial court's dismissal of such a claim on the ground that this Court has never explicitly recognized the tort of negligent supervision. *Jane Doe v. Archdiocese of Milwaukee, et al.*, Appeal No. 93-2074, (App. p. 15). Both decisions are recommended for publication. Review was also sought in the Supreme Court in Appeal No. 93-2074, and it has been taken under advisement pending a decision in this case.

This Court should affirm the trial court's dismissal of the negligent supervision claim. Wisconsin has not and should not recognize such a claim in this context, both because the recognition of such a claim is precluded by the U.S. and Wisconsin Constitution and because recognition of such a claim would contravene established principles of law and public policy. If such a claim is recognized in Wisconsin, moreover, the court should nevertheless affirm the trial court's decision because the plaintiff cannot state such a claim where, as here, the underlying conduct was not tortious.

A. The First Amendment Of The U.S. Constitution And Article 1, Section 18 Of The Wisconsin Constitution Preclude The Creation Of A Tort Of Negligent Supervision In This Case.

The First Amendment of the United States Constitution and Article 1, Section 18 of the Wisconsin Constitution preclude the Court from recognizing the tort of negligent supervision in this context.[15] To support a negligent supervision claim, the plaintiff would have to establish that the Archdiocese was negligent in selecting or retaining Father Donovan, because he in turn was incompetent or otherwise unfit. *Midwest Knitting*, 950 F.2d at 1298. Because the courts cannot constitutionally

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[15] The Wisconsin Supreme Court has applied the United States Supreme Court's interpretation of the requirements of the establishment clause to Article 1, Section 18. *Freedom From Religion Foundation, Inc. v. Thompson*, 164 Wis. 2d 736, 742, 476 N.W.2d 318 (Ct. App. 1991).

determine what makes one competent or fit to act as a Catholic priest, the claim should not be recognized.

The United States Supreme Court has consistently held that the Free Exercise clause of the First Amendment prohibits government interference into issues surrounding the selection of clergy by religious institutions, since such selections involve legitimate religious beliefs. *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16 (1929) (it is the function of church authorities to determine what the essential qualifications of a clergy person are and whether the candidate possesses them). *See also Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 711-12 (1976), (*citing Gonzalez*); *Kedroff v. St. Nicholas Cathedral of Russian O. CH.*, 344 U.S. 94, 116 (1952) ("Freedom to select the clergy . . . must now be said to have federal constitutional protection as part of the free exercise of religion against state interference.")[16]

The First Amendment also prohibits courts from determining whether religious authorities have negligently supervised clergy because such a determination involves the excessive entanglement of civil authorities in religious matters. *Schmidt v. Bishop*, 779 F. Supp. 321

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[16] *See also Olston v. Hallock*, 55 Wis. 2d 687, 201 N.W.2d 35 (1972) (court could not constitutionally review a religious institution's decision to terminate a minister); *Black v. St. Bernadette Congregation*, 121 Wis. 2d 560, 565, 360 N.W.2d 550 (Ct. App. 1984) (matters of internal church government are at the core of ecclesiastical affairs and as such are beyond the province of judicial review); *Rayburn v. General Conf. of Seventh Day Adventists*, 772 F.2d 1164, 1167-68 (4th Cir. 1985) *cert. denied* 478 U.S. 1020 (1986) (the right to choose clergy without government restriction underlies the well-being of religious community).

(S.D.N.Y. 1991). In *Schmidt*, the plaintiff alleged that religious authorities had negligently supervised a pastor who had initiated sexual contact during a counseling relationship. The court held that the First Amendment prohibited it from determining whether the ecclesiastical authorities negligently supervised the pastor, due to the problem of excessive entanglement:

> Any inquiry into the policies and practices of the church defendants in hiring or supervising their clergy raises the same kinds of First Amendment problems of entanglement discussed above, which might involve the court in making sensitive judgments about the propriety of the church defendant's supervision in light of their religious beliefs.
>
> * * *
>
> It would therefore also be inappropriate and unconstitutional for this court to determine after the fact that the ecclesiastical authorities negligently supervised or retained the defendant Bishop. Any award of damages would have a chilling effect leading indirectly to state control over the future conduct of affairs of a religious denomination, a result violative of the text and history of the establishment clause.

Id. at 332.

Similarly, in *Dausch v. Rykse*, 1993 U.S. Dist. Lexis 1448, *20 (N.D. Ill), *aff'd* 1994 U.S. App. Lexis 30603, ___ F.3d ___ (7th Cir. 1994), a federal court applying Illinois law ruled that a similar negligent supervision claim failed, among other reasons, because of the potential for excessive entanglement. The court ruled that a negligent supervision claim against a religious institution failed,

first, because the plaintiff had failed to allege that the defendants knew of the necessity and opportunity to exercise control over the clergyperson. The court also dismissed the claim, moreover, as barred by the First Amendment:

> Any inquiry into the policies and practices of church defendants in hiring or supervising their clergy is barred by the First Amendment because it might foster excessive state entanglement with religion. *Id.* at *20.

The Seventh Circuit recently affirmed this decision without specifically addressing whether such a claim is barred by the First Amendment. In a dissent, however, Judge Ripple argued that, while an inquiry could be made into the church's decision to employ the clergyman in a purely secular capacity – as a psychotherapist – no inquiry could constitutionally be made into the decision of the church defendants to retain the clergyman to perform services in any way religious in nature.

In our case, similarly, the Court would invite excessive entanglement of the state into religious matters by permitting a court to review the sufficiency of the Archdiocese's supervision of its priests, and this Court should therefore refuse to recognize a claim for negligent supervision under these circumstances. Wisconsin has already recognized that it cannot constitutionally review the decision of a religious institution to terminate a minister (*Olston v. Hallock*, 55 Wis. 2d 687, 698, 201 N.W.2d 35 (1972)) and, similarly, the court cannot constitutionally review the decision to hire, or how to supervise, a priest. The trial court is not equipped, nor should it be required,

to inquire into the essential characteristics of a priest or how the Church should screen and supervise its clergy.

B. The Court Should Refuse To Recognize A Negligent Supervision Claim In This Context On Policy Grounds.

The Court should also refuse to recognize this tort on public policy grounds. The fundamental principal [sic] of Wisconsin negligence law is that a tortfeasor is fully liable for all foreseeable consequences of his acts, except as those consequences are limited by policy factors. *Citizens State Bank v. Timm, Schmidt & Co.*, 113 Wis. 2d 376, 386, 335 N.W.2d 361 (1983). In this case, negligent supervision claims should not be recognized because recognition would contravene the public policy as embodied in the law of respondent [sic] superior, and because the Archdiocese should not be held to a standard which would require it to foresee that its employees would act outside the scope of their employment.

As the court of appeals properly held in this case, a priest who engages in sexual contact with a parishioner is plainly acting outside the scope of his employment, and the Archdiocese should therefore not be held liable for that conduct. The courts have created the doctrine of respondeat superior to hold employers liable for their employees' torts, but they have further carved out an exception to that liability where the employee acts outside the scope of the employment. That exception represents a policy decision to cut off vicarious liability at a certain point, and a realization, perhaps, that activity which is outside the scope of employment is also not

foreseeable to the employer. To hold the employer liable on a different theory for the same acts would undermine that policy. *See also Tichenor v. Roman Catholic Church of the Archdiocese of New Orleans*, 32 F.3d 953 (5th Cir. 1994) (employers do not have a duty to supervise their employees when the employees are off duty, nor do they have a duty to uncover an employee's concealed or clandestine acts).

C. The Plaintiff Cannot State A Claim For Negligent Supervision Because The Underlying Conduct Of The Priest Was Not Tortious.

Even if the court recognizes a claim for negligent supervision, it should nevertheless hold that the plaintiff has failed to state such a claim because the underlying conduct of Father Donovan was not tortious.

The plaintiff cannot succeed on a claim for negligent supervision absent proof that the underlying conduct of Father Donovan was tortious. *See Strock v. Pressnell*, 527 N.E.2d 1235, 1244 (Ohio, 1988) (a claim of negligent supervision cannot be maintained against the master unless the servant is individually liable for a tort against the third person); *accord Bladen v. First Presbyterian Church*, 857 P.2d 789, 797 (Okla. 1993); *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 508 N.W.2d 907 (1993).

In *Schieffer*, the Nebraska supreme court found that similar allegations, in that case a 7 year adult relationship, failed to state a supportable tort claim:

> What is involved in this case is conduct between consenting adults. There are no allegations that the defendant used force or fraud to accomplish

> his sexual relations with the plaintiff during the period from 1982 to 1989. The amended petition does allege that the plaintiff was "vulnerable" because of prior emotional problems. This allegation falls far short of alleging that the plaintiff was incapable of consenting to what took place. *Id.* at 718.

The court concluded that the plaintiff had not stated a tort claim against the defendant priest, and accordingly could not state a claim for negligent supervision against the church.

While the plaintiff in this case takes pain to keep her allegations ambiguous, like the plaintiff in *Schieffer*, she does not allege a supportable tort theory against Father Donovan. The plaintiff alleges that Fr. Donovan was a priest and used *"said relationship and his position as a priest* to force and coerce the plaintiff to have a sexual relationship, without her consent." [*Am. Complaint* at ¶ 9 (emphasis added)]. The plaintiff is not alleging a sexual assault, but rather is alleging that one adult convinced another adult to have sexual relations.

The plaintiff's allegations of a six year sexual relationship between two adults which was allegedly held together by the mental influence of one person over the other does not state a claim under any tort theory. The statutory cause of action for sexual exploitation by a therapist, even if it applied to allegations such as plaintiff's in general, cannot apply to this case because the statute was not created until 1985. *See supra* note 13. Causes of action for breach of contract to marry, alienation of affections and criminal conversation which *accrued* after 1971 were abolished by Wis. Stat. § 768.01, and any

claim under these theories is either abolished, if it accrued upon discovery in 1992 as alleged, or untimely, if it accrued earlier. *See generally Koestler v. Pollard*, 162 Wis. 2d 797, 471 N.W.2d 7 (1991). The plaintiff does not even state a claim for the common law action of seduction, because that claim requires allegations of a false or fraudulent representation. *See Slawek v. Stroh*, 62 Wis. 2d 295, 312-13, 215 N.W.2d 9 (1974).

Not only have these specific common law claims for adult sexual relations long since been abolished, moreover, but the legislature and the courts have made it clear that all similar claims are also abolished. In *Koestler*, for example, the court refused to allow the plaintiff to maintain a claim for intentional infliction of emotional distress arising out of an adult relationship. The court noted that the public policy underlying the legislature's abolition of claims under § 768.01 "dictates that the courts should not administer heart balm in the form of civil liability," and held that the plaintiff's claim violated that public policy by embroiling the courts in disputes in which judicial intervention is inappropriate. *Id.* at 802-804. In our case, similarly, the plaintiff's claims arising out of an adult relationship fail to state a claim, and her negligent supervision claim fails as well.

D. If A Negligent Supervision Claim is recognized Under These Circumstances, The Elements Must Include Proof That The Archdiocese Knew, Prior To The Alleged Tortious Conduct, That The Individual Priest Had Committed A Similar Bad Act.

Finally, if Wisconsin is to recognize a claim for negligent supervision against religious institutions, it is important that this Court clearly define the elements of such a claim. While the court of appeals remanded for a trial on this issue, it did so without providing guidance to the trial court on the elements of such a claim. This Court should hold, at a minimum, that prior notice of similar bad acts is an element of a claim for negligent supervision against a religious institution, and that the allegation must be specifically pled.

Jurisdictions which recognize a claim for negligent supervision against a religious institution also require the plaintiff to plead, with specificity, facts showing that the institution had prior knowledge of similar bad acts, due to the myriad of First Amendment problems which accompany such a claim:

> In order to survive a Civ. R. 12(b)(6) motion to dismiss, a plaintiff bringing a negligent hiring claim against a religious institution must plead operative facts with particularity. Specifically, plaintiff must plead facts which indicate that the individual hired had a past history of criminal, tortious, or otherwise dangerous conduct about which the religious institution knew or could have discovered through a reasonable investigation.
>
> . . .

> As with fraud claims and intentional tort claims against employers, an important principle underlies our decision to require that the plaintiff plead operative facts with particularity. In order to determine whether a religious organization has exercised due care in hiring, it is necessary to examine its employment policies and practices. In all probability, these practices will be infused with the religious tenets of the particular sect involved. If the state becomes involved in assessing the adequacy of these standards, serious entanglement problems may arise under the First Amendment.

Byrd v. Faber, 565 N.E.2d 584, 589-90 (Ohio 1991); *See also Tichenor v. Roman Catholic Church of the Archdiocese of New Orleans*, 32 F.3d 953 (5th Cir. 1994) (to support an independent negligence claim against the religious institution, the plaintiff must show that the defendants knew or suspected that the clergyman had engaged in sexual impropriety or might do so in the future); *Thompson v. Everett Clinic*, 71 Wash. App. 548, 860 P.2d 1054 (1993) (employer may be held liable for negligent supervision if it had prior knowledge of the dangerous tendencies of its employee); *See generally Rolph v. EBI Co's.*, 159 Wis 2d 518, 532, 464 N.W.2d 677 (1991) (a defendant's duty is established when it can be said that it was foreseeable that his act or omission to act may cause harm to someone).

If the Wisconsin courts are to recognize a negligent supervision claim against religious institutions, similarly, the Court should require some specific allegation demonstrating that the religious institution knew that the employee had a prior history of similar tortious conduct. While Wisconsin is a "notice pleading" state, greater

specificity has been required in libel cases due to First Amendment concerns, and greater specificity should likewise be required here.

CONCLUSION

For all the reasons set forth above, this Court should affirm the trial court's decision in all respects.

Dated this 22d day of November, 1994.

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SUPREME COURT OF WISCONSIN

JUDITH M. PRITZLAFF,

Plaintiff-Appellant,

v.

ARCHDIOCESE OF MILWAUKEE,

Defendant-Respondent-Petitioner,

REVEREND JOHN T. DONOVAN,

Defendant-Respondent,

ARIZONA HEALTH CARE COSTS CONTAINMENT SYSTEM AND HEALTH CARE FINANCING ADMINISTRATION,

Defendants.

DISTRICT I
Case No. 93-1846
Trial Court Case No. 92-CV-016110

CERTIFICATE OF FORM AND LENGTH

I hereby certify that this petition conforms to the rules contained in § 809.19(8)(b)(c) for the brief and appendix produced with a mono spaced font. The length of this brief is 34 pages.

Dated this 22 day of November, 1994.

Signed: Kevin P. Crooks
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SUPREME COURT OF WISCONSIN

JUDITH M. PRITZLAFF,

Plaintiff-Appellant,

-vs-

DISTRICT I
Case No. 93-1846
Trial Court Case No.
92-CV-016110

ARCHIDIOCESE OF MILWAUKEE,
Defendant-Respondent
Petitioner,
REVEREND JOHN T. DONOVAN,
Defendant-Respondent,
ARIZONA HEALTH CARE COSTS CONTAINMENT SYSTEM AND HEALTH CARE FINANCING ADMINISTRATION,
Defendants.

BRIEF OF PLAINTIFF-APPELLANT JUDITH M. PRITZLAFF

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STATEMENT OF ISSUES

Issue No. 1: Does the discovery rule toll the running of the statute of limitations for 27 years in a case where the last tortious act allegedly occurred in 1965?

How Presented: Plaintiff-appellant Pritzlaff appealed a dismissal by the trial court, and the issue was briefed before the Court of Appeals.

How Decided: The Court of Appeals reversed the trial court, holding that it was error to conclude, applying the discovery rule, that plaintiff had failed as a matter of law to exercise reasonable diligence in discovering the connection between her injury and the alleged acts.

Issue No. 2: Did the trial court properly dismiss this claim on public policy grounds?

How Presented: Pritzlaff appealed an adverse ruling; briefed by the parties before the Court of Appeals.

How Decided: The Court of Appeals reversed the trial court, holding that a sufficient factual basis was not presented for considering, evaluating and resolving the public policy issues involved in this case.

Issue No. 3: Did the trial court properly dismiss a claim for negligent supervision against the Archdiocese of Milwaukee, on the basis that Wisconsin has yet to recognize such a claim?

How Presented: Pritzlaff appealed an adverse ruling; briefed by the parties before the Court of Appeals.

How Decided: The Court of Appeals reversed the trial court, holding that the Court of Appeals has lawmaking

power to recognize a claim for negligent supervision under these circumstances.

STATEMENT OF THE CASE

The plaintiff, Judith Pritzlaff, started this action in November of 1992, to recover for injuries arising out of sexual misconduct on the part of a Catholic priest, Reverend John T. Donovan. The forced sex occurred from 1959 to 1965. Pritzlaff first met Donovan in the late 1950's while she was in high school. Donovan was a priest and used that position to cultivate a friendship and later as an excuse to meet Pritzlaff. He eventually made sexual advances, ultimately, forcing her to have sex with him without her consent. The emotional trauma which resulted for Pritzlaff let her to suppress the incidents until April of 1992, when she was able to perceive the nature and cause of her emotional injuries.

Pritzlaff also joined the Archdiocese of Milwaukee as a defendant, asserting that it was negligent and liable for failing to properly supervise Donovan.

The trial court granted a motion to dismiss Pritzlaff's compliant [sic] for failure to state a claim, which had been jointly brought by Donovan and the Archdiocese. The trial court ruled that the claim was barred by the statute of limitations, on public policy grounds and, that Wisconsin had to recognize a claim for negligent supervision.

Pritzlaff appealed and the Court of Appeals found in her favor with regard to the aforementioned grounds. This Supreme Court should affirm the decision of District I.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY REVERSED THE TRIAL COURT WITH REGARD TO TIMELINESS OF PLAINTIFF CLAIM.

The appellate court correctly reversed the trial court with regard to the timeliness. Pritzlaff, in her amended complaint, alleged that Donovan forced himself on her, without her consent. She did not file the action in the 1960's because of the trauma and psychological injuries inflicted upon her, suppressing the entire incident so as to allow her to cope with the incident itself. Upon discovery, she timely filed her action.

The trial court on a motion to dismiss for failure to state a claim must accept as true the allegations contained therein. Her complaint had to be liberally construed to accomplish substantial justice and, if reasonably possible, construe it to state a claim. *Paskeit v. Quality State Oil Co.*, 164 Wis.2d 800, 805, 476 N.W.2d 871, 873 (1991).

The trial court and the Archdiocese both characterize Donovan's conduct as being consensual. (Petitioner's Appendix p. 38). They apparently misunderstood the meanings of force, coercive and without consent. Clearly, forced, non-consensual sex is a tort. And as a tort is subject to the "discovery rule", namely, " . . . tort claims shall accrue on the date the injury is discovered or with reasonable diligence should be discovered, whichever occurs first". *Hansen v. A.H. Robins Co.*, 113 Wis.2d 550, 560, 335 N.W.2d 578, 583 (1983).

Discovered in April of 1992, filed in November, plaintiff's claim should not be barred. That is, unless you

can rule that plaintiff failed to exercise reasonable diligence to discover her injury and its cause. Without one iota of evidence in the record, the trial court did just that. The trial court matter of factly rejected plaintiff's claim, without a hearing, with no evidence presented for or against her. Without some type of inquiry, how can a trial court determine whether Pritzlaff exercised or failed to exercise reasonable diligence? Some inquiry is absolutely essential. The clock starts ticking when the victim knows of her injury, its nature and who caused it. *Byrne v. Becker*, 176 Wis.2d 1037, 1047, 501 N.W.2d 402, 406 (1993). The complaint says April of 1992 and at this stage must be accepted as true. The trial court acted inappropriately, dismissing the action without a complete determination of the facts.

II. PLAINTIFF'S CLAIM SHOULD NOT BE DISMISSED ON PUBLIC POLICY GROUNDS.

To adopt the position of the Archdiocese would be contrary to long standing, well reasoned case law. An insufficient factual basis exists for a court to make a summary ruling concerning public policy considerations. there exists no record to support the Archdiocese's claim of prejudice. No record exists to demonstrate that memories have faded, records were lost or that witnesses are no longer around. Why can't they present a meaningful defense? Without a hearing, giving the plaintiff an opportunity to challenge broad assertions of prejudice, any summary proceeding would be necessarily suspect. This Court has recognized that principle. In *Haas v. Chicago & N.W.R.R. Co.*, 48 Wis.2d 321, 326-27, 179 N.W.2d 885, 880

(1970), the Court stated, " . . . where the issues raised are so complex, or the factual connections so attenuated, a full trial must precede the court's determinations." Public policy issues should only be considered after a complete factual determination is made at the trial court level. Nothing has been offered to show Pritzlaff was not diligent or that her claim is fraudulent. The statute of limitations would still have meaning and be enforceable, just start counting when the discovery was made.

III. THIS COURT SHOULD AFFIRM THE APPELLATE COURT'S RECOGNITION OF PLAINTIFF'S NEGLIGENT SUPERVISION CLAIM.

Wisconsin, though not explicitly, does recognize the tort of negligent supervision and it should be extended to a religious body. From *Kamp v. Coxe Bros. & Co.*, 122 Wis. 206 (1904) on, we have held employers liable for the negligent retention or supervision of an employee. The tort of negligent supervision was properly pled by Pritzlaff and should not be discarded, even if it requires this Court to act when it has not done so before. To give the Archdiocese the protection they claim, would be tantamount to allowing it ordain a known sexual predator and let him prey upon parishioners. At some point, the general good will, health and safety of the public must be considered.

Plaintiff is in agreement that once this Court recognizes claims for negligent supervision, guidance as to its elements should also be provided for future cases. As the Archdiocese points out, other jurisdictions have acted in

this area and the Catholic church and the Free Exercise clause of the First Amendment have survived.

CONCLUSION

In the interest of justice and fundamental fairness, plaintiff should have been allowed to at least present evidence demonstrating the crippling effect of the injuries sustained and steps taken by her to discover the cause of those injuries. Then the trial court could have made a determination as to whether it was reasonable or not.

Plaintiff's action against the Archdiocese should not have been barred by the statute of limitations without an evidentiary hearing as to the reasonableness of her efforts to discover the cause of her injuries.

The Archdiocese should not be allowed to escape its responsibilities to the appellant. The Archdiocese was responsible for recruiting Fr. Donovan, training him and perhaps, most importantly, screening him to determine whether or not he was the type of person capable of putting aside natural urges.

The Archdiocese failed to find that Donovan was incapable of setting aside those urges and allowed him to gravitate around young, impressionable teenage girls. They allowed him to cultivate friendships and in this specific case take that friendship as an excuse to chase down the appellant and satisfy those urges at her expense. All this was accomplished without any regard to the emotional trauma caused appellant and far reaching

ramifications on her life. By not having appropriate safeguards to ferret out candidates like Donovan, the Archdiocese breached its duty to appellant and others to present a priest who is totally committed to the teachings of their faith. As a direct result of that breach, appellant was caused great injury and harm, injuries and harm she still suffers.

The Archdiocese was negligent in allowing Donovan to acquire his position and use that position to meet and select a victim, the plaintiff.

The ruling of the Appellate court should stand.

Dated at Milwaukee, Wisconsin this 27th day of Dec., 1994.

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SUPREME COURT OF WISCONSIN

JUDITH M. PRITZLAFF,

Plaintiff-Appellant,

v.

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ARCHDIOCESE OF MILWAUKEE,

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Defendant-Respondent,

ARIZONA HEALTH CARE COSTS CONTAINMENT SYSTEM AND HEALTH CARE FINANCING ADMINISTRATION,

Defendants.

PLAINTIFF-APPELLANT'S MOTION FOR RECONSIDERATION

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MOTION

Plaintiff-Appellant Judith M. Pritzlaff (Plaintiff) respectfully moves the Court, pursuant to § 809.64, Stats., to reconsider its decision in the above-captioned action, dated June 27, 1995 on the grounds that:

1. The United States Supreme Court has expressly held that a religious organization, like the Catholic Church, is not protected from civil responsibility for its secular activities by the First or Fourteenth Amendments to the U.S. Constitution. *General Council on Finance and Administration of the Methodist Church v. Superior Court of California*, 439 U.S. 1369, 99 S. Ct. 35, 58 L.Ed.2d 63 (1993).

2. The Court should craft an exception to its ruling with regard to the commencement of the running of the statute of limitations for childhood sexual abuse by a priest or other person in a position of trust and authority over the child as this Court has recognized exists in an incest context. *Opinion*, pp. 15-16.

3. If the Wisconsin Supreme Court is nonetheless concerned about the opportunity for fraudulent claims where a claim of sexual abuse of a child by a person in a position of trust and authority over the child is presented when the child is an adult, the Court should consider imposing a rule such as has been imposed in other jurisdictions that requires corroborative evidence that the sexual assault occurred. See *Meiers-Post v. Schafer*, 170 Mich. App. 174, 427 N.W.2d 606 (1988).

4. The rule enunciated in this *Opinion* regarding the commencement of the running of the statute of limitations should apply prospectively only since there has

been great reliance by plaintiff and many other claimants on the rule as articulated in *Hammer v. Hammer,* 142 Wis. 2d 257, 418 N.W.2d 23 (Ct. App. 1987), *rev. denied,* 144 Wis. 2d 257, 418 N.W.2d 23 (1987) and *Byrne v. Bercker,* 176 Wis. 2d 1037, 501 N.W.2d 402 (1993) and since it changes the law of *Hammer* and *Byrne. Steinberg v. Jensen* Case No. 92-2475, ___ Wis. 2d ___, ___ N.W. 2d ___ (filed June 30, 1995), at note 23.

5. In addition, although Plaintiff at all times knew the role of Defendant-Respondent Donovan (Donovan) in her alleged sexual abuse, she did not know and could not have known the role of Defendant-Respondent Archdiocese of Milwaukee (Archdiocese) in causing her injury, as she has alleged, until at least the commencement of her action.

ARGUMENT

1.

THE UNITED STATES SUPREME COURT HAS EXPRESSLY RULED THAT RELIGIOUS ORGANIZATIONS ARE NOT INSULATED FROM STATE SCRUTINY OF THEIR SECULAR ACTIVITIES BY THE FIRST OR THE FOURTEENTH AMENDMENTS.

In the majority's recent *Pritzlaff* opinion, the Court accepted, for purposes of this appeal, that the tort of negligent supervision exists in this state, but barred its application to the facts of this case. The Court concluded "that the First Amendment to the United States Constitution prevents the courts of this state from determining what makes one competent to serve as a Catholic priest since such a determination would require interpretation

of church canons and internal church policies and practices." Majority op. at 21. However, the U.S. Supreme Court has expressly ruled that religious organizations are *not* protected by the First or Fourteenth Amendments for responsibility for their secular activities. We draw the Court's attention to *General Council on Finance and Administration of the United Methodist Church v. Superior Court of C.A., County of San Diego,* 439 U.S. 1355, 99 S.Ct. 35, 58 L.Ed.2d 63 and 77 (1978).

In *General Council,* an Illinois religious organization argued that a state court's jurisdictional analysis improperly violated the First and Fourteenth Amendments to the U.S. Constitution by examining the internal structure of the church. The defendant in *General Council* cited previous authority where the Supreme Court rejected efforts to intrude into intra-church disputes. *General Council,* 439 U.S. at 1370. Justice Rehnquist explained, though, that legal actions arising out of secular disputes, even if involving internal church matters, would not be violative of the U.S. Constitution:

> In my view, *applicant plainly is wrong when it asserts that the First and Fourteenth Amendments prevent a civil court from independently examining, and making the ultimate decision regarding, the structure and actual operation of a hierarchical church and its constituent units* in an action such as this. There are constitutional limitations. . . . [b]ut this Court has never suggested that those restraints similarly apply outside the context of such intraorganization disputes. Thus, *Serbian Eastern Orthodox Diocese* and the other cases cited by the applicant are not in [sic] point. Those cases are premised on a perceived danger

> that in resolving intrachurch disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. (citation omitted). *Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization,* in which fraud, breach of contract, and statutory violations are alleged. As the Court stated in another context: "Nothing we have said is intended to even remotely imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public." *Cantwell v. Connecticut,* 310 U.S. 296, 306, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) (emphasis added).

General Council, 439 U.S. at 1372-73.

Thus, the Supreme Court has explicitly rejected attempts to preclude an action initiated by a third party against a religious body merely because some inquiry into church practices is required. Similarly, here the Plaintiff's allegations of wrongdoing on the part of the Archdiocese do not require inquiry into the "intraorganization" matters of the Archdiocese or the Catholic Church. The Plaintiff's allegations in her Complaint, assumed to be true for the purposes of the appeal *Wamser v. Bamberger,* 101 Wis. 2d 637, 305 N.W.2d 158 (1981), are that the Archdiocese failed to properly select, train and supervise an employee, not as a priest or for the performance of priestly duties but as an "employee and agent of the Archdiocese . . . likely to come into contact with teenage girls/ young women in the community within the Archdiocese." Pet. App. 28-29. Plaintiff's complaint is that the Archdiocese failed in its duty to act properly in its interaction with the public. This is secular activity, the

necessary dealings that even a religious organization must conduct with the public day to day in order to function in a community. Its buildings must meet applicable building codes. Its employees, including clerics, must pay taxes. They must operate their cars according to the traffic regulations. Even its bingo games are regulated by the state. Sec. 563.11, Stats. Certainly the manner in which a religious organization chooses to expose women and children in the community to its employees is no less secular and is thus subject to civil and criminal scrutiny.

If religious organizations are protected by the First and Fourteenth Amendments from scrutiny of the manner and method by which they place their employees and agents in the community to deal with women or children they meet in the public community, the very serious consequences of such a policy should be considered.

In the context of the current *Opinion*, a church could escape civil liability for the sexual molestation of parishioners, even if young children were involved. A church could hire someone it knew was a pedophile or predatory sexual deviant, allow the individual private access to women or children without warning, and then fail to take corrective action once the abuse was known, at the same time evading civil liability. However, if a day care center engaged in similarly abhorrent conduct, it could face staggering financial penalties that would appropriately punish the facility and perhaps improve supervisory practices at other day care centers.

Similarly, to take the *Opinion* to its logical conclusion, a church could flaunt a host of laws that apply to the rest of society with virtual impunity. Religious bodies could

escape civil liability for employee conduct that could include gambling, discrimination, unfair labor practices, tax code violations, drug trafficking, pornography or any other illegal activity, since a civil action arising out of these activities would require an examination of internal church policies and practices. At the same time, though, the State would tightly regulate these activities in any other field and punish those entities whose employees violated the law and/or compensate the victims of any illicit conduct.

Finally, this Court must consider the possibility that pseudo-religious organizations, even cults, could shield themselves from civil liability for any number of activities. Though the majority noted in a footnote that almost all priests lead responsible lifestyles, their ruling is not limited solely to these priests. *Opinion* at 11, n.3. Rather, the concern lies with those clerics who deviate from a "responsible" lifestyle. Any religious body would receive comprehensive protection from civil suits that inquire into the conduct of their employees, even when these employees have engaged in atrocious activities. This Court should not establish such broad barriers to the imposition of liability.

2.

THE SUPREME COURT SHOULD CREATE AN EXCEPTION FOR ALL INSTANCES OF SEXUAL ABUSE OF A CHILD BY PERSONS IN A POSITION OF TRUST AND AUTHORITY OVER THE CHILD.

The judicial system in Wisconsin contains many pending actions alleging sexual abuse by perpetrators of

numerous descriptions claimed by victims of numerous descriptions. This Court's *Opinion* in this action dated June 27, 1995 will have far-reaching effects on these cases. If read broadly, this Court's *Opinion* can be construed to mean that any victim of sexual abuse has the statute of limitations commence to run on the day the victim is aware that forced sexual contact took place, regardless of the age of the victim and/or the circumstances of the perpetrator's relationship to the victim.

However, the *Opinion* also suggests, at pp. 15-16, a must more limited reading, inferring that a victim claiming sexual abuse as an adult has, as a matter of law, enough information at the time of the forced sexual contact to commence the running of the statute of limitations, but that where the sexual abuse is of a child by a perpetrator who has a relationship to the child such as a parent, the victim cannot, in equity, be charged with such knowledge:

> Further, because of these relationships and types of factual situations, and because of the age of the victims, oftentimes victims do not realize the wrongfulness of the acts. . . . Thus, for reasons of public policy, a special discovery rule has been created for these cases in an effort to provide adequate protection to children who "have been harmed because of a 'most egregious violation of the parents/child relationship.' " *Opinion*, at p. 16.

Many of the cases that presently exist in the Wisconsin judicial system involve claims by individuals who were sexually abused as a child by a person in a trust and

authority position over them, e.g. a parent, teacher, therapist, doctor, priest. If this Court intended to recognize at pp. 15-16 of its *Opinion* an exception to its ruling regarding the commencement of the running of the statute of limitations for persons alleging childhood sexual abuse by a parent, there is no logical or rational basis to distinguish between a child sexually abused by a parent and a child sexually abused by his or her parish priest, teacher or doctor. Each relationship potentially contains all of the elements of authority, trust and control over a child with the accompanying confusion and fear experienced by a child, as recognized by this Court at pp. 15-16 of its *Opinion*.

It is respectfully submitted that in the interest of clarity and the efficient administration of justice, this Court should clarify its *Opinion* to state that victims of childhood sexual abuse inflicted by a person in a position of trust and authority over the child are not required to apply the statutes of limitations until the victim reaches a stage in life when the fact-finder believes that he or she knows the nature of his or her injury, the cause of his or her injury and the defendant's part in that cause. *Borello v. U.S. Oil Company*, 130 Wis. 2d 397, 414, 388 N.W.2d 140 (1986).

3.

IF CONCERNS ABOUT FALSE CLAIMS REMAIN, THIS COURT SHOULD CONSIDER ADDING A REQUIREMENT OF CORROBORATION OF THE ASSAULT.

If this Court is nonetheless concerned that victims of childhood sexual abuse by persons of trust and authority over them who bring their claims years later after they have reached adulthood may allow for the bringing of fraudulent claims, the Court may wish to consider imposing an additional requirement of proof in such cases that the victim have corroborative evidence of such assault. For example, see *Meiers-Post, supra* at p. 176.

Plaintiff does not believe that such an additional requirement is necessary to prevent the successful presentation of fraudulent claims by persons alleging childhood sexual abuse by persons in positions of trust and authority. However, if this Court does desire such a protection, a requirement of corroborative evidence of the assault should satisfy any such concern.

4.

THE RULE IN *PRITZLAFF* SHOULD APPLY PROSPECTIVELY ONLY.

The judicial system in Wisconsin has a substantial number of actions that have been brought by individuals claiming sexual abuse as children or as adults by perpetrators of all descriptions. Prior to this action, the opinions in *Hammer, supra* and *Byrne, supra* had been relied upon by these claimants and by many trial courts. This court has the authority, if it wishes, to modify the rulings

in *Hammer* and *Byrne*. However, where there has been great reliance upon decisions that are now being overruled or modified, it is the better practice to make a ruling which modifies or overrules prior decisions prospective only. *Rollo v. Goers*, 174 Wis. 2d 709, 497 N.W.2d 724 (1993).

The *Opinion* in this action at least modifies *Hammer* and *Byrne* to limit their application to circumstances other than a party claiming sexual abuse as an adult. To the extent this has changed the law of *Hammer* and *Byrne*, the *Opinion* should be prospective only. *Steinberg v. Jensen*, Case No. 92-2475, ___ Wis 2d ___, ___ N.W. ___ (Filed June 30, 1995) It is respectfully submitted that this Court should declare that its *Opinion* dated June 27, 1995 applies prospectively only to causes of action which accrue after June 27, 1995.

5.

THE PLAINTIFF COULD NOT HAVE KNOWN OF THE ARCHDIOCESE'S ROLE IN CAUSING HER INJURY; CONSEQUENTLY, THE STATUTE OF LIMITATIONS COULD NOT HAVE BEGUN TO RUN.

The Plaintiff admits that she was always aware that Defendant-Respondent, John T. Donovan (Donovan), was the person who sexually abused her. Clearly, at all times from the date of the forced sexual contact by Donovan she was aware of that "defendant's part in that cause" of her injury. *Borello, supra* at p. 414. However, it is impossible to charge the plaintiff as of the date of such forced sexual contact with knowledge of the Archdiocese' [sic] "part in that cause" of her injuries. In most sexual abuse

cases, and in this sexual abuse case in particular, the plaintiff could not have known what the Archdiocese did or did not do to allow, encourage or support the assault upon her, as she has alleged, until much later, and perhaps not until the commencement of her lawsuit or thereafter during the course of discovery. Consequently, the statute of limitations should not begin to accrue against her as to the Archdiocese until she knew or can reasonably be expected to know of the Archdiocese's role.

The Archdiocese may respond that such a rule would only serve to support groundless suits against it started without a good faith basis in fact. However, the requirements of a good faith basis for filing an action and the sanctions that may be imposed under §§802.05(1)(a) and 814.025, Stats., as well as the availability of summary judgment under §802.08, Stats. are sufficient protections against such suits.

Consequently, while the Court's ruling that the statute of limitations commenced to run against the plaintiff at the time of the forced sexual contact may be correct as to Defendant Donovan, it is respectfully submitted that such an application is in error with respect to the defendant, Archdiocese of Milwaukee.

CONCLUSION

Upon the above argument and authority it is respectfully submitted that this Court should reconsider and modify its *Opinion* on June 27, 1995 to provide that:

1. A religious organization is not protected by the First or Fourteenth Amendments from state scrutiny of

the manner and method by which it hires, trains and supervises its employees and agents it intends will interact with women and children in the public communities it operates in.

2. An exception should be recognized that the statutes of limitation for sexual abuse of a child by a person in a position of trust or authority over the child, including parents, clerics, teachers, doctors and therapists, does not begin to run until the victim becomes aware of (1) the nature of his or her injury, (2) the cause of that injury, and (3) the particular defendant's part in that cause.

3. If the court feels an additional protection against fraudulent claims is wise, imposing in such cases of alleged sex abuse of a child a requirement of corroborating evidence of the assault.

4. The *Opinion* in this action applies prospectively only to causes of action which accrue after June 27, 1995.

Respectfully submitted this 17th day of July, 1995.

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